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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NANCY GRACIA,

Petitioner,

v.

VOLVO EUROPA TRUCK, N.V.,
a foreign corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the National Transportation and Motor Vehicle Safety Act preempt Petitioner's common law tort claim of a windshield retention defect when there is no federal statute or Motor Vehicle Safety Standard in effect regulating windshield retention in the subject truck?

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OFFICIAL AND UNOFFICIAL CASE CITATIONS

The unreported Recommendation and Report of Magistrate Judge Rebecca Pallmeyer denying Volvo Europa Truck N.V.'s ("Respondent's") motion for summary judgment on the issue of preemption, dated March 6, 1996, is reproduced at Appendix A. The unreported Memorandum Opinion and Order of District Judge Paul Plunkett granting Respondent's motion for summary judgment, dated June 20, 1996, is reproduced at Appendix B. The reported opinion of the United States Court of Appeals for the Seventh Circuit, *Gracia v. Volvo,* 112 F.3d 291 (7th Cir. 1997), affirming Judge Plunkett's order, is reproduced at Appendix C.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on April 24, 1997. Petitioner's timely Petition for Rehearing is reproduced at Appendix C and was denied on June 10, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994) and Supreme Court Rules 10(a) and (c).

STATUTES INVOLVED

15 U.S.C. § 1381, reenacted as 49 U.S.C. § 30101 (1994)

15 U.S.C. § 1392(d), reenacted as 49 U.S.C. § 30103(b) (1994)

15 U.S.C. § 1397(k), reenacted as 49 U.S.C. § 30103(e) (1994)

49 C.F.R. § 571.121 (1996)

49 C.F.R. § 571.208 (1996)

49 C.F.R. § 571.212 (1996)

The relevant text of these statutes and regulations is reproduced at Appendix D.

STATEMENT OF THE CASE

This action was removed from the Circuit Court of Cook County, Illinois, to the United States District Court, Northern District of Illinois. Federal jurisdiction was premised on the diversity of citizenship between the parties under 28 U.S.C. § 1441(b) (1994). Petitioner resides in Illinois, and seeks damages in excess of the jurisdictional minimum. Respondent is incorporated in and has its principal place of business in Ghent, Belgium. Petitioner appealed from the District Court's order granting summary judgment to Respondent. That order was signed and judgment entered thereon June 20, 1996. Petitioner's Notice of Appeal was filed on July 17, 1996, and the appeal was docketed on July 19, 1996. The

United States Court of Appeals for the Seventh Circuit had jurisdiction of this appeal under 28 U.S.C. § 1291 (1994).

Petitioner sued Respondent for personal injuries she suffered after being ejected from the passenger compartment of a Volvo truck during a rear end impact with another vehicle. Respondent designed and manufactured the truck, which Petitioner alleged was defective under Illinois law in that: (a) the windshield retention system was weak and inadequate to prevent the windshield from popping out of the truck during foreseeable impacts; and (b) there were insufficient devices within the truck to prevent ejection of vehicle occupants through the windshield in the event of a frontal collision.

Petitioner was one of three occupants in the truck, which was driven by a fellow employee in rush-hour traffic. When the truck rear-ended another vehicle, its windshield popped out and Petitioner was ejected onto the pavement, sustaining a burst fracture of her spine. Today, she suffers residual spinal cord injury. Petitioner would not have suffered any serious injury had the windshield stayed in place in the accident sequence.

As it relates to the issue on appeal, Petitioner's expert opined that the truck was defective because the windshield was not bonded to the frame of the cab, typically accomplished with an adhesive or a metal flange and a rubber seal. The truck's windshield was held into the frame only by a rubber part; there was no adhesive or metal strip to prevent the windshield from popping out of the cab's frame in a collision. These design deficiencies made the truck unreasonably dangerous. Had the windshield been bonded to the truck's cab, it would not have

popped out, and Petitioner would not have been ejected from the truck. The severity of an occupant's injuries greatly increases when an occupant is ejected from a vehicle.

By authority of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381, recodified without substantive change at 49 U.S.C. § 30101 (1994) (hereinafter the "Safety Act"), Federal Motor Vehicle Safety Standards have been promulgated by the National Highway Traffic Safety Administration ("NHTSA"). 49 C.F.R. § 571 (1996). The only standard relevant to this appeal is Standard 212, which deals with windshield mounting and retention. 49 C.F.R. § 571.212 (1996).

Standard 212 excludes from its scope vehicles whose gross vehicle weight rating (GVWR) exceeds 10,000 pounds, and the standard does not apply to "forward control vehicles." 49 C.F.R. § 571.212 (paragraphs S3 and S4). The truck has a GVWR in excess of 10,000 pounds, and is considered a "forward control vehicle" due to its cab configuration. The parties agree that Standard 212 does not apply to the subject truck because of its weight and configuration.

Standard 212 states a minimum performance standard for vehicles to which it applies. It requires that when a test vehicle contacts a fixed collision barrier at 30 m.p.h., no less than 50 percent of the windshield periphery shall be retained in the windshield frame. 49 C.F.R. § 571.212 (See paragraphs S5.1 and S5.2).

Respondent maintains that since Standard 212 excluded from its scope vehicles like the subject truck, NHTSA intended there to be no regulation of windshield retention of such vehicles, either by federal rule or state

common law. Respondent argues that the exclusion of this vehicle from Standard 212 serves to preempt Petitioner's common law claim that the windshield retention system was defective under Illinois common law. Respondent filed a motion for summary judgment, which Magistrate Judge Pallmeyer recommended be denied; she compared NHTSA's decision to exclude certain vehicles from Standard 212 to NHTSA's decision to forego regulation of brake systems on certain vehicles, which was found not to warrant preemption in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S. Ct. 1483 (1995). Appendix A. Judge Plunkett rejected Magistrate Judge Pallmeyer's recommendation, finding that "NHTSA's explicit exclusion of forward control vehicles from Standard 212 expressly preempts the aspect of performance of windshield retention for such vehicles." Appendix B. The Seventh Circuit affirmed on similar grounds. Appendix C.

REASONS FOR GRANTING THE WRIT

This case presents the identical legal issue as *Freightliner v. Myrick*, 514 U.S. 280, 115 S.Ct. 1483 (1995), but the Courts below reached the opposite and incorrect result. This Court's holding in *Myrick* controls the outcome of the present case. The only method available for correcting this error is the granting of this petition.

The Seventh Circuit is the *only* court in the country to find preemption of a common law tort claim by a motor vehicle safety standard *which does not apply to the vehicle in question*. The majority of state courts of last resort to reach the issue of preemption under any circumstance have found that the Safety Act does not preempt common law tort claims. All Circuit Courts and

state courts of last resort finding preemption have done so only in cases involving Standard 208, the passive restraint/airbag standard, which poses a somewhat different preemption question than the instant case.

To allow this decision to stand would frustrate the purpose and intent behind the Safety Act to foster public safety.

I. The Seventh Circuit's decision defies this Court's resolution of this issue in *Freightliner Corp. v. Myrick.*

In *Myrick,* this Court rejected a claim brought by a truck manufacturer that the absence of a motor vehicle safety standard requiring anti-lock brakes preempted plaintiff's common law claim against it. Justice Thomas wrote the opinion in which seven Justices joined, with Justice Scalia concurring only in the judgment. This Court stated in the first paragraph of its decision: "*we hold that the absence of a federal standard cannot implicitly extinguish state common law.*" *Freightliner v. Myrick, supra* at 1485.

Myrick construed the Motor Vehicle Safety Act at issue in this case. It referenced Motor Vehicle Safety Standard 121, which concerns braking standards for vehicles. Standard 121's stopping distance and lock-up requirements do not apply to trucks and trailers, similar to the exclusion of certain vehicles in Standard 212 at issue in the instant case. 49 C.F.R. § 571.121 (1996) (paragraph S3).

This Court carefully analyzed the purposes of the Safety Act, and construed the Act as a whole to determine whether Congress intended to preempt common law

actions. It noted that the express purpose of the Safety Act is "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. 1381, reenacted as 49 U.S.C. § 30101 (1994); *Freightliner v. Myrick, supra* at 1485.

This Court held that the Act's "preemption clause applies only '[w]henever a federal motor vehicle safety standard . . . is in effect' with respect to 'the same aspect of performance' regulated by a state standard." 15 U.S.C. 1392(d), reenacted as 49 U.S.C. § 30103 (1994), *Freightliner v. Myrick, supra* at 1487. Since there is no express federal standard addressing stopping distances for trucks or trailers (because of the exclusion in Standard 121 for those vehicles), states are free to establish or to continue in effect their own safety standards concerning those aspects of performance. *Freightliner Corp. v. Myrick, supra*. In this case, as in *Myrick*, Standard 212 is not "in effect" for the subject truck, therefore, there can be no federal preemption of Petitioner's common law claim.

The *Myrick* Court did not reach the argument raised by petitioner that the term "safety standard" in 15 U.S.C. 1392(d), reenacted as 49 U.S.C. § 30103 (1994), preempts only state statutes and regulations, but not common law actions. The Court likewise did not need to address petitioner's claim that the savings clause does not permit a manufacturer to use a safety standard to immunize itself from state common law liability. *Freightliner v. Myrick, supra* at 1487.

In concluding, this Court held that the preemption argument made by the truck manufacturers is:

> . . . ultimately futile . . . because respondents' common law actions do not conflict with federal law. First, it is not impossible for petitioners to

> comply with both federal and state law because there is simply no federal standard for a private party to comply with. Nothing in the Safety Act or its regulations currently regulates the use of ABS devices. As Standard 121 imposes no requirements either requiring or prohibiting ABS systems, tractor trailer manufacturers are free to obey state standards concerning stopping distances and vehicle stability. *Freightliner Corp. v. Myrick, supra* at 1488.

The holding in *Myrick* directly controls the result that should be reached in the instant case. Like Standard 121 at issue in *Myrick*, Standard 212 exempts certain vehicles from its reach, including the subject truck. There is no federal safety standard in effect for the subject truck regarding windshield mounting or retention capabilities. Accordingly, the common law duty to sell this truck with a reasonably safe windshield retention system does not conflict with federal law, and cannot be preempted.

The Safety Act has two clauses (commonly called the "preemption clause" and the "savings clause") which must be read together to determine whether Congress intended that common law actions be preempted or preserved. The preemption clause states:

> *Whenever a Federal Motor Vehicle Safety Standard established under this subchapter is in effect, no state* or political subdivision of a State *shall have any authority* either *to establish*, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment *any safety standard* applicable to the same aspect of performance of such vehicle or item of equipment *which is not identical to the federal standard*. Nothing in this section shall be construed as preventing any state from enforcing any safety

> standard which is identical to a federal safety standard. 15 U.S.C. 1392(d), reenacted as 49 U.S.C. § 30103(b) (1994). Italics added.

The savings clause of the Act provides:

> Compliance with any federal motor vehicle *safety standard* issued under this subchapter does not exempt any person from *any liability under common law*. 15 U.S.C. 1397(k), reenacted as 49 U.S.C. § 30103(e) (1994). Italics added.

Petitioner also raises the two substantial arguments never reached in *Myrick*: that the preemption clause only negates conflicting state *safety standards*, as defined by the Safety Act, and not common law actions; and that the savings clause protects from preemption all common law actions brought to recover damages for defects proven without regard to compliance with any federal motor vehicle safety standard. This Court did not need to reach these issues in *Myrick* because it determined that there can be no preemption since there was no federal safety standard "in effect" for the vehicle. Cf. 15 U.S.C. 1392(d), reenacted as 49 U.S.C. § 30103(b) (1994). That same result should be reached here, in light of the exclusion from Standard 212 of vehicles like this truck.

II. All courts to reach this precise issue have ruled against preemption.

Other than this Court in *Myrick*, only two other courts have faced the issue of preemption where the subject vehicle did not fall within the scope of a particular safety standard. *Attocknie v. Carpenter Manufacturing, Inc.*, 901 P.2d 221 (Okla. App. 1995); and *In re Ford Motor Company Bronco II Products Liability Litigation*, 909 F.Supp. 400 (E.D. La. 1995).

Attocknie involved a claim against a manufacturer for failing to provide seatbelts on a bus. Standard 222 is a seatbelt provision, but it does not require school buses with a GVWR in excess of 10,000 pounds to have seatbelts (just as Standard 212 here did not require similarly sized vehicles to meet the windshield retention crash test standard). The Court relied on the savings clause to rule that the action was not preempted:

> "Standard 222, established by federal law under the Safety Act, sets forth the requirements for school bus passenger seating protection and restraining barriers for buses with a GVWR of 10,000 or more. The Standard does not require seatbelts for passengers in these buses. The Safety Act specifically and expressly through its preemption provisions, saved this state tort cause of action through its savings provision." *Attocknie, supra* at 226.

Also similar to the instant case is *In Re Ford Motor Company Bronco II Products Liability Litigation, supra.* Vehicle owners sued Ford claiming their vehicles were unduly prone to rollover. Ford moved for judgment on the pleadings, claiming that the common law actions were preempted by the Safety Act because NHTSA determined that stability regulation of light utility vehicles is unwarranted. *In Re Ford Motor Company Bronco II Products Liability Litigation, supra* at 403. Just as Respondent did below, Ford argued that a history of the NHTSA activity indicated that the agency made a conscious determination to reject any role for utility vehicle stability standards, and that this "determination" has the character of a ruling of non-regulation. *In Re Ford Motor Company Bronco II Products Liability Litigation,*

supra at 407. This is the exact argument made by Respondent in this case and accepted below.

The Court rejected Ford's contention:

> The preemption scenario relied on by Ford, though tenable, is the most nebulous possible setting for the finding of preemption. First, Ford relies not on any actual, written safety standard promulgated under the Safety Act, but on the *absence* of agency action which Ford contends has the "character of a policy or ruling of non-regulation." Second the allegedly conflicting state standard likewise is not an actual, written safety standard or regulation, but rather a common law action for damages. Finally, the existence of an express preemption clause that does not mention common law claims, coupled with the savings clause that appears to preserve such claims, provides fairly reliable indicium of congressional intent not to preempt such claims by expression or implication. *In Re Ford Motor Company Bronco II Products Liability Litigation, supra.*

The only courts to confront preemption by a federal safety standard where the subject vehicle is not within the scope of that standard have all found against preemption of common law tort claims. The Seventh Circuit's refusal to follow this Court's decision in *Myrick* and the holdings in *Attocknie* and *In re Ford Motor Company Bronco II* is incorrect, and should be reversed.

III. The majority of state courts of last resort to reach the issue of preemption under any circumstance have found that the Safety Act does not preempt common law tort claims.

The Supreme Court of Wisconsin addressed the issue of preemption by the Safety Act over twenty years ago in

Arbet v. Gussarson, 66 Wis.2d 551, 225 N.W.2d 431 (Wis. 1975). That Court held that the Safety Act did not preempt common-law tort claims. Emphasis was placed on the savings clause, which illustrated Congressional intent that federal regulations *supplement but not supplant* the common law of products liability. *Arbet v. Gussarson, supra* at 438.

Tebbetts v. Ford, 665 A.2d 345 (N.H. 1995) was a hotly disputed airbag preemption case decided in the fall of 1995. Amicus briefs were tendered on behalf of the automotive industry, and on behalf of injured parties. In its concise and clear opinion, the New Hampshire Supreme Court reviewed the Safety Act, along with the legislative history, and determined that compliance with motor vehicle safety standards does not preempt state common law. *Tebbetts v. Ford, supra* at 345-348. The court noted, relying on *United States v. James*, 478 U.S. 597, 604 (1986), that "it is difficult to imagine broader language" than the savings clause: "compliance does not exempt any person from any liability under common law." *Tebbetts v. Ford, supra* at 347. The Supreme Court of New Hampshire reversed defendant's preemption summary judgment, and remanded the cause for trial on the merits of the common law claim.

The Indiana Supreme Court also held that the Safety Act does not preempt a claim for failure to install airbags. *Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995).

> After examining the stated purposes and policies of the Safety Act, the statutory language at issue, and the legislative and regulatory history, we are convinced that Congress was focused first and foremost on 'reducing traffic deaths and injuries and deaths to persons resulting from

> traffic accidents' and that its strategy was to pursue those purposes both through federal regulation and state common law. Because compliance with Rule 208 and recognition of plaintiff's claim here is not 'physically impossible', and because recognition of the claim here does not stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' - indeed, we believe it furthers them - we find no basis for implying preemption of plaintiff's claim. *Wilson v. Pleasant, supra* at 339.

Most recently, the Arizona Supreme Court held that common-law tort claims were not preempted by the Safety Act. *Munroe v. Galati*, 938 P.2d 1114 (Ariz. 1997). The Court, en banc, stated, "[w]e find no preemption, express or implied, of common-law tort claims based on a manufacturer's compliance with federal *minimum* standards and failure to provide safety devices permitted but not required by the Act." *Munroe v. Galati, supra* at 1120. In finding against preemption, the court placed great emphasis on the language of the savings clause of the Safety Act, stating, "we believe [the savings clause] does not allow a manufacturer to claim federal preemption to avoid state common-law liability claims in air bag cases." *Munroe v. Galati, supra* at 1120.

Only two other state courts of last resort have ruled on this issue. *Cooper v. General Motors*, 1996 WL 272362 (Miss. 1996); and *Zimmerman v. Volkswagen of America, Inc.*, 920 P.2d 67 (Idaho 1996). Both of these courts found preemption by the Safety Act in situations where Standard 208, the passive restraint/airbag provision, applied to the subject vehicle. See part IV., *infra*.

IV. All Circuit Courts and state courts of last resort finding preemption have done so in cases involving Standard 208.

The First, Third, Ninth, and Tenth Circuits have found common law tort claims for failure to install air bags to be preempted by Standard 208. *Wood v. General Motors Corp.*, 865 F.2d. 395 (1st Cir. 1988), *cert. den.*, 494 U.S. 1065 (1990); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990), *cert. den.*, 498 U.S. 853 (1990); *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. den.*, 494 U.S. 1065 (1990); and *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996). The Supreme Courts of Idaho and Mississippi have also found common law tort claims for failure to install air bags preempted by Standard 208. *Zimmerman v. Volkswagon, supra*; and *Cooper v. General Motors, supra.*

Standard 208 cases are far more likely candidates for preemption than the instant case. Congressional intent not to preempt common law claims is less clear in airbag cases than in other auto product defect cases. Standard 208 provides various design options, anyone of which a manufacturer may use and still comply with the standard. 49 C.F.R. § 571.208 (1996). Also, Congress passed a law, 15 U.S.C. 1410(b) (1994), *prohibiting* NHTSA from requiring airbags without express Congressional approval, discussed in *Wood v. General Motors Corp.*, *supra* at 398-401.

The decisions of the Third Circuit in *Pokorny v. Ford Motor Company, supra*, and *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777 (3rd Cir. 1992) illustrate the difference made by Standard 208 in ruling on preemption of common law tort claims. Plaintiff in *Pokorny* raised

three common law tort claims: 1) failure to equip the vehicle with air bags, 2) failure to equip the vehicle with automatic seat belts, and 3) failure to equip the vehicle with window netting. *Pokorny, supra* at 1118. The Court ruled that plaintiff's first two claims, failure to install air bags and automatic seat belts, were preempted by Standard 208, which allows manufacturers to choose from several options in providing restraint systems for passengers. *Pokorny, supra* at 1123. Placing emphasis on the Savings Clause, the Court found that the third claim, failure to provide protective netting over the windows, did not conflict with Standard 208's regulatory framework, and was therefore not preempted. *Pokorny, supra* at 1126.

In *Buzzard*, plaintiff brought a common law tort claim against a trucking company for defective design of a trailer's illumination system. *Buzzard, supra* at 778. In holding that Standard 108 did not preempt plaintiff's tort claim, the Third Circuit again emphasized the savings clause:

> "In *Pokorny*, we refused to construe the savings clause . . . so narrowly that it would apply only to common law actions wholly beyond the Safety Act's purview. Such a construction would deprive the savings clause of any practical effect." *Buzzard, supra* at 780-1.

As compliance with Standard 108 and the common law duty alleged by plaintiff in *Buzzard* would not have been impossible, the Third Circuit properly ruled against preemption.

The Fifth, Eighth, and Eleventh Circuits have held that common law tort claims are not preempted by the Safety Act. *Perry v. Mercedes Benz of North America,*

Inc., 957 F.2d 1257 (5th Cir. 1992); *Larsen v. General Motors*, 391 F.2d 495, 506 (8th Cir. 1968); and *Doyle v. Volkswagenwerk AG*, 114 F.3d 1134 (11th Cir. 1997). In *Perry*, the Fifth Circuit found that plaintiff's common law tort claim for defective design of an air bag system was not preempted by Standard 208. *Perry, supra* at 1259. The court placed great emphasis on the savings clause, stating:

> "[w]e find that the Savings Clause itself unambiguously reveals Congress' intent to preserve common law liability." *Perry, supra* at 1264.

In *Doyle*, the Third Circuit held that common law tort claims were not preempted by federal safety standards. *Doyle, supra* at 1135. The Court then certified a state law question to the Georgia Supreme Court. *Doyle, supra* at 1135. The Georgia Supreme Court found that Georgia law permits a claim against an automobile manufacturer despite compliance with federal safety standards. *Doyle, supra* at 1135. The issue of preemption having been settled, the Third Circuit thereby remanded the action for further proceedings. *Doyle, supra* at 1135.

As the Eighth Circuit decided years ago in *Larsen v. General Motors*, 391 F.2d 495, 506 (8th Cir. 1968),

> It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability. The common law is not as sterile or rigid and serves the best interests of society by adapting standards of conduct and responsibility that fairly meet the emerging and developing needs of our time. The common law standard of duty to use reasonable care in light of all the circumstances can at least serve the

> needs of our society until the legislature imposes higher standards or courts expand the doctrine of strict liability for tort. The Act is a salutary step in this direction and not an exemption from common law liability. *See Tebbetts v. Ford Motor Company, supra* at 348 (N.H. 1995).

There is a substantial split in the Circuit Courts on the issue of preemption of common law tort claims under the Safety Act. Preemption has been refused in Fifth, Eighth, and Eleventh Circuits. Preemption of failure to provide airbag cases has been upheld in the First, Ninth and Tenth Circuits. In the Third Circuit, failure to provide airbag claims are preempted, but other common law tort claims are not preempted. In view of this split, the Court should allow this Petition to restate and reaffirm its definitive holding in *Freightliner v. Myrick, supra*, denying preemption where meeting the common law duty will not conflict with any motor vehicle safety standard.

V. The decision of the Seventh Circuit conflicts with the express legislative intent behind the Safety Act.

The legislative history of the Safety Act allows but one conclusion: that state common law claims are not preempted. In enacting the Safety Act in 1966, Congress was well aware of the existence of common law design defect lawsuits of the type involved here. *See, e.g., Hearings on H.R. 13228 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 1256-57 (1966) ("*House Hearings*") (testimony of Representative Charles P. Farnsley regarding design defect litigation involving the General Motor's Corvair); *id.* at 1315 (statement of Daniel P. Moynihan regarding the

case of *Comstock v. General Motors Corp.*, 99 N.W.2d 627 (Mich. 1959); *House Hearings* at 1351 (statement of Mr. Maurice A. Garbell concerning Corvair design defect litigation); *Hearings on S. 3005 Before the Senate Committee on Commerce*, 89th Cong. 2d Sess. 252 (1966) (testimony of Dr. Seymour Charles noting the pendency of 100 lawsuits challenging the safety design of the Corvair). *See also generally* Kurt B. Chadwill, *Automobile Passive Restraint Claims Post-Cipollone: An End To The Federal Preemption Defense*, 46 Baylor L. Rev. 141, 178 n.223 (1994).

In light of this knowledge, the Safety Act's preemption provision and savings provision were crafted by Congress with the intent to ensure that the Act did not preempt any common law actions.

The bill reported out of the Senate Commerce Committee and passed by the full Senate, S.3005, 89th Cong. 2d Sess. (introduced on March 2, 1966) contained a preemption provision, section 104 of the bill, similar to the bill ultimately enacted into law, except that it did not contain the "same aspect of performance" limitation. *See* 112 Cong. Rec. 14,257 (1966). However, the Senate bill did not include a savings provision. Even so, the Senate Committee Report stated:

> [T]he Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law. S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966).

Senator Magnuson, the sponsor of the Senate bill, stated on the floor of the Senate that:

> Compliance with Federal standards would not necessarily shield any person from broad liability at the common law. The *common law on product liability still remains as it was*. 112 Cong. Rec. 14,230 (1966) (emphasis added).

The original House bill contained a preemption provision, section 102(b), similar to the preemption provision in the Senate bill, and like the Senate bill, did not contain a savings provision. *See* H.R. 13228, 89th Cong. 2d Sess. (introduced on March 2, 1966). During the Interstate and Foreign Commerce Committee hearings on that bill, an attorney from South Carolina raised the following pointed concern regarding the possible effect of the House bill on the liability of manufacturers under state law:

> We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product.
>
> You may think that the manufacturer is afraid of Government regulation but the cry you are hearing may be "Brer Fox, please don't throw me in the briar patch." If the Government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of "Our product meets Government standards," and an already compounded problem will be recompounded. *House Hearings* at 1249 (testimony of Mr. Tom Triplett).

Representative Farnsley, a member of the Committee, referred to this testimony a few moments later:

> This gentleman has raised, perhaps not brilliantly but I think well, [a] question . . .
>
> He said Brer Rabbit told Brer Fox "Don't throw me in the briar patch." . . .
>
> . . . Now the question is up: Is the manufacturer responsible for inherent dangerous design? If there are Federal standards, this man has said this brings an absolute wall against those suits, and he feels that the manufacturers want these standards. I think maybe he has a point.
>
> . . . .
>
> [T]he courts, under the old common law and our statutes, hold them responsible. Now I think we should take a long time before we change that responsibility. I have talked longer than I intended to, but I feel this is very important. *Id.* at 1256-57.

Representative Farnsley then engaged in the following colloquy with committee Chairman Staggers, who was the sponsor of the House bill:

> THE CHAIRMAN. I would say to you again, and I have this much faith and I know you do too, in the men who sit on this committee, that *we will not put an umbrella over anyone.*
>
> MR. FARNSLEY. Good. You believe, then, you can set Federal standards and this isn't a defense in a lawsuit, to say, "We have met Federal standards"? This is what this witness said.
>
> THE CHAIRMAN. *That is not the intent of this legislation.*
>
> MR. FARNSLEY. I know it is not the intent, but is it possible?

> THE CHAIRMAN. It could be if we did not accept our responsibility here as a committee. *But we do not intend to put that umbrella up, I assure you. Id.* at 1258 (emphasis added).

Representative Mackay intervened to drive home the point:

> With regard to Title I, which I predict is going to be the real hard nut to crack in the minds of the committee because of its complexity, the agency bill provides for certification of vehicles that actually met minimum safety standards.
>
> This does not preclude building a car with higher standards of safety, *nor does it relieve makers of any legal liability whatsoever in terms of their obligation to the consumer.* [*Id.* at 1260 (emphasis added).]

Consistent with the foregoing, the House Committee amended the original House bill by inserting a savings provision, section 108(c) of the House bill, identical in all respects to the savings provision that was signed into law: "Compliance with *any* Federal motor vehicle safety standard issued under this title does not exempt *any* person from *any* liability under common law." *See* 112 Cong. Rec. 19,625, 19,657 (1966) (emphasis added).

The savings provision was explained in the House Committee Report as follows:

> *Common Law Liability.* Section 108(c) of the reported bill provides that compliance with any Federal motor vehicle safety standard does not exempt a person from any liability under common law.
>
> It is intended and this subsection specifically establishes, that *compliance with safety stan-*

> *dards is not to be a defense or otherwise to affect the rights of parties under common law, particularly those relating to warranty, contract, and tort liability.* [H.R. Rep. No. 1776, 89th Cong. 2d Sess. 24 (1966) (*"House Report"*) (emphasis added).

During the floor debates on the reported House bill, Representative O'Neill proposed an amendment that would have strengthened the remedial provisions of the bill by adding criminal penalties for willful violations of the Act. In opposing this amendment, Representative Dingell, a member of the House Committee that had reported the bill, stated:

> We are told . . . that this legislation is not strong enough. A look at the bill, at what the committee has brought to the floor, disproves this . . . *[W]e have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser.* This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain in the buyer, and they can be exercised against the manufacturer. 112 Cong. Rec. 19,663 (1966) (emphasis added).

A Senate-House Conference Committee was convened to reconcile the differences between the Senate and House bills. The Conference Committee adopted the savings provision of the House bill *in haec verba*, and also adopted the House version of the preemption provision with certain minor changes not relevant here.

The Conference Committee Report made no mention of the Senate's agreement to the savings provision included in the House bill. But the Senate conferees' understanding of the savings provision was clearly stated on the

floor of the Senate by Senator Magnuson, the sponsor of the Senate bill, as well as by Senator Cotton, a conferee. Senator Magnuson stated:

> The Senate conferees accepted the House provision that compliance with Federal standards does not exempt any person from common law liability. This provision makes explicit, in the bill, a principle developed in the Senate report. This provision does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with Federal standards. No court rules of evidence are intended to be altered by this provision. 112 Cong. Rec. 21,487 (1966).

Senator Cotton explained:

> The Senate conferees also yielded on a provision, inserted by the House, declaring that compliance with any Federal standard does not exempt any person from liability under common law. Nevertheless, it seems clear and was, I believe, the consensus of the conferees on both sides, that proof of compliance with Federal standards may be offered in any proceeding for such relevance and weight as courts and juries may give it. 112 Cong. Rec. 21,487 (1966).

This review of the language and history of the Safety Act's preemption provision and savings provision should dispose of any argument that the Act expressly preempts petitioner's common law tort action. The preemption provision does not even come into play here both because state tort law is not a "safety standard" and because Standard 212 does not regulate the "aspect of performance" at issue in the common law tort claims brought by petitioner. More fundamentally, as the language of the preemption provision and the savings provision reveals,

and as the legislative history confirms, Congress did not intend those provisions to preempt common law tort actions. The history shows that Congress did not intend the preemption provision to have that effect, and Congress made doubly certain that the Act would not preempt common law actions by adding the savings provision. The House Report summarizes the point in words that bear repeating here:

> It is intended and [the savings provision] specifically establishes, that [as a matter of federal law] compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to . . . tort liability. *House Report* at 24.

Congress' intent and the language of the Act govern issues of preemption. Even if the relevant federal agency has an interpretation of preemption, ". . . an interpretation rendered by an agency responsible for administering the statute is entitled to no special deference. [citations omitted]. In all events, *the courts will reject an agency interpretation which conflicts with Congressional intent.*" *Grunback v. Dime Savings Bank of New York*, 74 F.3d 331, 336 (1st Cir. 1996). To the extent that the Seventh Circuit found NHTSA's intent favored preemption, such conclusion should be entirely disregarded as it conflicts with express Congressional intent that common law claims survive.

The Courts below relied entirely on their view of NHTSA's intent, which Petitioner believes is legally irrelevant in light of the strong evidence of Congressional intent. If NHTSA's intent is relevant to this Court's consideration of this case, *what is most ironic about the Judgment is that NHTSA thinks it is wrong.*

During the pendency of the appeal, a request was made to NHTSA by Trial Lawyers for Public Justice, P.C., to participate as an amicus, or to tender a letter of opinion. NHTSA declined to file an amicus brief, but it did tender a four page opinion letter for consideration by the Seventh Circuit. In that letter, NHTSA stated that it "disagreed with both the result and the rationale adopted by the District Court." NHTSA further stated "the District Court's opinion is incorrect." Plaintiff's motion for leave to file that document was denied by the Seventh Circuit. In another preemption case, an opinion letter from NHTSA's Acting Chief Counsel, Mr. Womack, was accepted and reviewed by the Court in its decision. *A.I.A.M. v. Abrams*, 84 F.3d 602, 610 (2d Cir. 1996). Plaintiff respectfully asks if NHTSA's intent concerning preemption is considered relevant, that this Court consider Mr. Womack's opinion letter or invite NHTSA to file an amicus brief to address the issues raised by this Petition.

Preemption is the exception not the rule. Congressional intent to preempt must be clear and manifest. Nowhere is it written in this Record, nor is it stated in any congressional debate, that Congress intended common law claims be preempted by NHTSA's non-regulation. Congress, by its words, intended that all common law claims be preserved, even if the product complied with relevant Safety Standards. 15 U.S.C. 1397(c).

The language and history of these provisions leave no room for the conclusion that the Safety Act preempts Petitioner's common law tort claims. It is simply implausible to find in the preemption provision and the savings provision a "'clear' and 'manifest'" federal statutory purpose "[t]o displace traditional state [law] in such a man-

ner." *BFP v. Resolution Trust Corp.*, 114 S. Ct. at 1765 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990)). To the contrary, Congress reconciled the federal interests in regulating motor vehicle safety and the state interests in preservation of common law tort remedies for those injured in motor vehicle accidents by determining that both schemes should coexist.

CONCLUSION

This Court's holding in *Myrick* controls the outcome of the present case, yet the Courts below did not follow this Court's precedent. The Seventh Circuit is the *only* court in the country to find preemption of a common law tort claim by a federal motor vehicle safety standard *which does not apply to the vehicle in question*, defying the clear language of *Myrick*. The majority of state courts of last resort to reach the issue of preemption under *any* circumstance have found that the Safety Act does not preempt common law tort claims. All Circuit Courts and state courts of last resort finding preemption, other than in this case, have done so in cases involving the airbag standard, which raises a somewhat different issue than the instant case.

There is no conflict between the common law duties Petitioner seeks to enforce, and the duties imposed upon Respondent by Motor Vehicle Safety Standards. Congressional intent that Petitioner's claim not be preempted is clear, and must be given full effect. Any suggestion that the NHTSA intended its non-regulation of windshield retention of trucks of this size to preempt Petitioner's claim is factually incorrect, and legally not controlling, since Congress' intent concerning preemption is clear and controls.

For these reasons, Petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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[Dated March 6, 1996]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NANCY GRACIA,	)	
	)	No. 87 C 10005
Plaintiff,	)	
v.	)	Judge
	)	Paul E. Plunkett
VOLVO EUROPA TRUCK,	)	
N.V., a foreign corporation,	)	Magistrate Judge
	)	Rebecca R. Pallmeyer
Defendant.	)	

REPORT AND RECOMMENDATION

On August 12, 1987, Plaintiff Nancy Gracia was a passenger in a 1986 Volvo FE6/1.3 truck ("Volvo truck") when it struck the rear of another vehicle being operated in the same direction on the Kennedy expressway. As a result of the accident, Plaintiff was thrown from the vehicle and sustained serious injuries. Plaintiff has brought this action under the court's diversity jurisdiction against Defendant Volvo Europa Truck, N.V. ("Volvo"), the manufacturers of the Volvo truck. Plaintiff claims that the windshield retention system on the Volvo truck is inadequate to prevent the windshield from ejecting during foreseeable impacts. Defendant Volvo has moved for summary judgment, arguing that Plaintiff's strict liability claim is preempted by the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381, which provides that whenever a federal motor vehicle safety standard is in effect, no non-identical state safety standard is applicable. Volvo urges that where there is a federal standard governing windshield retention require-

ments, any differing state standard, including one imposed by the imposition of liability under common law, conflicts with the federal standard and is thus preempted. Because the safety standard at issue is not applicable to the Volvo truck involved in this case, this court recommends that Defendant's motion for summary judgment be denied.

DISCUSSION

Summary judgment is appropriate only where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Thiele v. Norfolk & Western Ry. Co.*, 68 F.3d 179, 181 (7th Cir. 1995). For purposes of this motion, there are no disputes of fact: the parties agree that Plaintiff flew out of the cab of the Volvo truck at the time of impact. The issue here is whether Plaintiff's tort claim against Volvo is preempted by federal law.

Under the Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, Congress has the power to preempt state law. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986). Federal preemption of state law can occur in three situations: (1) where Congress explicitly preempts state law; (2) where preemption is implied because Congress has occupied the entire field; and (3) where preemption is implied because there is an actual conflict between federal and state law. *Schneidewind v. ANR Pipeline Co.*, 485 IJ.S. 293, 300 (1988). In determining whether federal statutes or regulations preempt state law, the court's "sole task is to ascertain the intent of Congress," *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 280 (1987), exercising a

presumption against preemption. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). In this case, Defendant Volvo argues that Plaintiff Gracia's claims are preempted expressly and by implication. The court will address these arguments turn.

Express Preemption

Congress' express purpose for enacting the National Traffic and Motor Vehicle Safety Act ("Safety Act") was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. To achieve this purpose, the Act delegates to the Secretary of Transportation the authority to establish "federal motor vehicle safety standards" ("FMVSS") that provide practical and objective minimum standards for the performance of motor vehicles and their equipment. *Id.* §§ 1391(2), 1392(a). The Secretary, in turn, has delegated this duty to the National Highway Transportation Safety Administration ("NHTSA"). *See* 49 C.F.R. § 501.2. Section 1392 of tile Safety Act mandates that state law may not establish a safety standard that differs from the FMVSS[1] standards. The Act also contains a saving clause, however, which provides that compliance

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[1] The relevant provision states:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal Standard. 15 U.S.C. § 1392(d).

with the applicable federal safety standard "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

FMVSS 212, as promulgated by the NHTSA, "establishes windshield retention requirements for motor vehicles during crashes." 49 C.F.R. § 571.212.S1.[2] This standard applies to the following motor vehicles:

> Passenger cars, and to multipurpose passenger vehicles, trucks, and buses having a gross vehicle weight rating of 10,000 pounds or less. However, it does not apply to forward control vehicles, walk-in van-type vehicles, or to open-body type vehicles with fold-down or removable windshields.

49 C.F.R. § 571.212 S3. It is undisputed that the Volvo truck in which Plaintiff was injured is excluded from FMVSS 212; it weighs more than 10,000 pounds and is a forward control vehicle. (Defendant's 12(N4) Statement 1 34.) Volvo contends, nevertheless, that § 1392(d) of the Safety Act expressly preempts Plaintiff's common law

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[2] For vehicles that fall within the coverage of Standard 212, the NHTSA prescribes that when the vehicle traveling longitudinally forward at any speed up to and including 30 mph impacts a fixed collision barrier that is perpendicular to the line of travel of the vehicle, the windshield mounting of the vehicle shall retain not less than the minimum portion of the windshield periphery specified below:

> *Vehicles equipped with passive restraints.* Vehicles equipped with passive restraint systems shall retain not less than 50 percent of the portion of the windshield periphery on each side of the vehicle longitudinal centerline.
>
> *Vehicles not equipped with passive restraints.* Vehicles not equipped with passive restraint systems shall restrain not less than 75 percent of the windshield periphery.

action. (*See* Volvo's Reply to Plaintiff's Response to Motion for Summary Judgment Based on Federal Preemption (hereinafter "Volvo's Reply"), at 2.) Volvo reasons that, by exempting the subject vehicle from the requirements of Standard 212, the NHTSA expressed an intention that no standards should be placed upon the subject vehicle with respect to windshield retention. According to Volvo, exposure to possible liability under state common law has the effect of setting up a state standard which is contrary to the federal standard because, as Volvo urges, "where the common law standards address product safety, then they are 'safety standards', in ordinary, accepted usage." (Volvo's Reply, at 6.)

In Volvo's view, NHTSA's affirmative decision to exclude the subject vehicle from FMVSS 212 operates as an express preemption of state tort law in the area of windshield bonding. (Volvo Europa Truck, N.V.'s Memorandum of Law in Support of Motion for Summary Judgment Based on the Doctrine of Federal Preemption (hereinafter "Defendant's Memorandum"), at 7.) The Supreme Court has held that "[a] federal decision to forego regulation in a given area may imply the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate." *Arkansas Elec. Co-op Corp. v. Arkansas Pub. Serv. Comm'n,* 461 U.S. 375 (1983); *see also Freightliner Corp. v. Myrick,* 115 S. Ct. 1483 (1995).[3] Before the court will draw such a con-

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[3] Any discussion of the preemptive effect of a Congressional decision *not* to regulate would seem to fall squarely under the heading of "Implied preemption." Nevertheless, the Supreme Court in *Myrick* clearly considered the issue as part of its discussion of express preemption. 115 S. Ct. at 1487. This court will do the same.

clusion, however, the federal agency's failure to regulate must "take on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the [federal] statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

In the present case, the administrative history surrounding FMVSS 212 does not adequately demonstrate that the NHTSA's exemption of certain trucks from the regulation expressed the agency's determination that state common law claims should be preempted. The agency had in fact proposed to amend FMVSS 212 to include the excluded vehicles in 1969. (See Windshield and Forward-Facing Window Requirements, Docket No. 69-29, Notice 2, Ex. 6 to Defendant's Memorandum (hereinafter "AMA Comments").) In response to this proposal, the Automobile Manufacturers Association, Inc. ("AMA") submitted comments expressing the view that preserving the windshield opening as a means of escape after an accident in the heavier trucks (10,000 lbs. or more) "*may* outweigh the advantages that could be derived from increased windshield retention in such vehicles." (*Id.* at S70-3.4 (emphasis added).) In addition, the AMA stated in its comments to the NHTSA that because of the characteristics of forward-control vehicles,[4] "in many accidents . . . either the windshield is contacted by the object struck or the impact results in substantial deformation of the mounting structure. In either event specifying a windshield retention capability would be meaningless." (*Id.* at S70-3.5.)

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[4] In a "forward control" vehicle, the cab sits up on top of the engine and the windshield is generally flush with the front bumper. See 49 C.F.R. § 571.3(b).

The AMA did note that the retentive capability of a windshield could provide benefit to passengers, simply because passengers do not have a steering wheel in front of them to hold them in place. (AMA Comments, at S70-3.3.) The AMA asserted, however, that the presence of a passenger in heavier vehicles is less frequent than in multipurpose passenger vehicles and lighter trucks. The AMA premised this belief on data which indicated that in a number of injury-producing accidents involving larger vehicles, there was only one occupant—the driver. (*Id.* at S270-3.3 to -3.4.)

While it is clear from the administrative history that the NHTSA relied on the AMA's comments in deciding not to extend the scope of the windshield standards, see e.g., 37 Fed. Reg. 16,980 (1972) ("It is recognized that forward control vehicles may have difficulty achieving windshield retention since objects impacted by the front of such a vehicle tend to either impact the windshield itself, or deform the windshield mounting"). It is not clear to what extent those comments controlled the decision. In any event, the AMA submission contained only one comment suggesting that increased windshield retention would further the risk to safety-an accident victim's need to escape through the window. This court cannot conclude, on the basis of this one comment, that the NHTSA affirmatively decided that any regulation in this area would be harmful. A more reasonable reading of the regulatory history suggests that the decision to forego regulation of these larger vehicles stemmed from a lack of data demonstrating that an extension of the standard was necessary.

Viewed in this light, the decision to forego regulation here is not significantly different from the NWSA decision under scrutiny in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), a case cited by Volvo in support of its express preemption argument. (See Volvo's Reply, at 1.) In *Myrick*, a consolidation of two essentially identical cases, a truck manufactured by each defendant jackknifed and collided with an oncoming plaintiff, allegedly as a result of the defendants' failure to install anti-lock braking systems ("ABS"). 115 S. Ct. at 1485. The defendants argued that the plaintiffs' claims were expressly preempted by the NHTSA's decision to exclude the vehicles at issue from FMVSS 121, a standard which effectively required the use of ABS on trucks with air brakes. *Id.* at 1486. The Safety Administration had amended FMVSS 121 after the Ninth Circuit suspended the standard due to lack of sufficient evidence to demonstrate that ABS would not create greater dangers than it sought to avoid. *See Paccar, Inc. v. NHTSA*, 573 F.2d 632 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). Rejecting the defendants' argument that the absence of regulation itself constituted preempting regulation, the *Myrick* Court stated:

> Here, there is no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and vehicle stability. Indeed, the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes. NHTSA did not decide that the minimum, objective safety standard required by [the FMVSS] should be the absence of all standards, both federal and state. Rather, the lack of a federal standard stemmed from the decision of a

> federal court that the agency had not compiled sufficient evidence to justify its regulations.

Myrick, 115 S. Ct. at 1486. Volvo argues that *Myrick* is distinguishable from and in fact supportive of its argument in the instant case, because the administrative history "makes it clear that the NHTSA made an affirmative decision" not to subject vehicles like the Volvo truck to FMVSS 212. (Defendant's Memorandum, at 4-6.) This court recognizes a distinction, however, between an exemption from regulation on the one hand, and, on the other, a decision that state claims are barred. The fact that the NHTSA chose to leave the windshield retention system of the Volvo truck uncovered by its regulation does not require the conclusion that the NHTSA intended the Safety Act to preclude Plaintiff from bringing a common law claim of strict liability. Indeed, the NHTSA decision here apparently stems, similarly, from the lack of sufficient evidence to justify the regulation.

Volvo's arguments to the contrary, then, the NHTSA did not decide that the minimum standard required of these vehicles "should be the absence of all standards, both federal and state." *Myrick*, 115 S. Ct. at 1487. See also *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, No. MDI—991, 1995 WL, 683854, at *7 (E.D. La. Nov. 13, 1995) (rejecting defendant's argument that NHTSA's failure to propose anti-rollover stability standards preempted state regulation; the court finds it "difficult to see how the language, legislative history, and purpose of the Safety Act, considered in conjunction with the Agency's explanations for foregoing . . . regulation . . ., can be viewed as a definitive standard prohibiting any and all regulation . . . ."). Because there is no clear and manifest evidence that Congress intended to preempt Plaintiff's

common law claim, this court finds that such claim is not expressly preempted.[5]

Implied Preemption

If the court concludes that Plaintiff's claim is not expressly preempted, Volvo argues the court should find the claim preempted by implication. Federal law preempts a conflicting state law by implication where compliance with both the federal and the state regulations is a physical impossibility, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (no conflict preemption where it was not impossible for avocado growers to comply with federal standards gauging maturity of avocados by oil content, as well as state standards which gauged maturity based on picking dates), or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See also *Myrick*, 115 S. Ct. at 1487. Volvo reasons that the possibility of common law liability "would force Volvo to comply with state law tort theory regarding windshield retention requirements when a federal agency has already affirmatively eliminated any such requirement." (See Defendant's Memorandum, at 8.) Volvo further argues that the purposes of the Safety Act

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[5] Having found that no federal standard exists with respect to vehicles over 10,000 pounds or having a forward-control configuration, the court need not address Plaintiff's argument that the express preemption clause applies only to standards promulgated by the state, and not common law claims. (Plaintiff's Memorandum in Response to Motion for Summary Judgment Based on Federal Preemption, at 3; Volvo's Reply, at 6-8.) See *Myrick*, 115 S. Ct. at 1487 n.3.

would be frustrated if common law standards of care were permitted to dictate a vehicle manufacturer's behavior. (*Id.* at 8.)

As a preliminary matter, the court notes that Volvo is not precluded from arguing implied preemption simply because the Safety Act includes an express preemption clause.[6] Courts addressing the issue of federal preemption prior to 1992 routinely considered arguments of implied preemption, regardless of whether an express preemption clause existed in the relevant statutory scheme. See, e.g., *Pokomy v. Ford Motor Co.*, 902 F.2d 1116, 1121-22 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816, 825 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990). In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), however, the Supreme Court suggested that a Congressional decision to include an explicit preemption provision in enacted legislation forecloses any finding of implied preemption with respect to that legislation, as long as the provision "provides a reliable indicium of congressional intent with respect to state authority." *Id.* at 517 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978)).

The Supreme Court had an opportunity to revisit this aspect of the *Cipollone* decision in *Myrick*—this time in the context of the Safety Act. The plaintiff in *Myrick* argued that implied preemption could not exist under the

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[6] Although she fails to develop it, Plaintiff appears to make this argument against implied preemption on the first page of her response brief. (Plaintiff's Memorandum in Response to Motion for Summary Judgment Based on Federal Preemption, at 1.)

Act because Congress had decided to include an express preemption clause. 115 S. Ct. at 1487. The Supreme Court disagreed, and proceeded to address the merits of the defendants' implied preemption argument. *Id.* at 1488. Justice Thomas, writing for the Court, explained that, "at best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." *Id.* Given the factual similarities between the case at bar and *Myrick* (see supra express preemption discussion), this court chooses, analogously, to reach Volvo's implied preemption argument.[7]

Having reached the merits of the implied preemption issue, this court finds that Defendant's argument is without merit because Plaintiff's common-law action does not conflict with federal law. See *Myrick*, 115 S. Ct. at 1488. First, it is not impossible for Defendant to comply with both federal and state law because, as this court has found, there is nothing in the Safety Act or its regulations which currently regulates windshield characteristics of vehicles over 10,000 pounds or of a forward-control type. The subject vehicle is expressly exempted from FMVSS 212. As FMVSS 212 imposes no windshield retention requirements for these vehicles, manufacturers

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[7] The court notes, however, that several post-*Myrick* decisions involving the National Traffic and Motor Vehicle Safety Act have reached the opposite conclusion. See *Wilson v. Pleasant*, 660 N.E.2d 327, 334 (Ind. 1995) (with regard to airbag claim, implied preemption argument precluded by existence of express preemption clause); *Tebbets v. Ford Motor Co.*, 665 A.2d 345, 348 (N.H. 1995) (same), *cert. denied*, 116 S. Ct. 773 (1996), *Heiple v. C.R. Motors, Inc.*, 666 A.2d 1066, 1084 (Pa. Super. Ct. 1995) (same).

are free to obey state standards concerning windshield resistance.[8]

Second, Plaintiff's lawsuit cannot be said to frustrate the accomplishment and execution of the full purposes and objectives of Congress. Congress' express purpose for enacting the Safety Act was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. Thus, it would seem that a common law standard of care that itself promoted safety would be fully consistent with the Safety Act and FMVSS 212, not an obstacle to the achievement of Congress' purposes. Common law tort liability assists in carrying out the Congressional purpose by working to

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[8] Each of the decisions cited by Defendant addresses regulations which affirmatively apply to (rather than exempt) the vehicles in those cases. See *Pokomy*, 902 F. 2d at 1116; *Taylor*, 875 F.2d 816; *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); see also *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (speed of train on which common law action was based fell squarely within the federal speed limit). In contrast, there is no regulation directly applicable to the subject vehicles in the instant case. Furthermore, there was an actual conflict between state and federal law in each of the cases cited by Defendant. *Pokomy, Taylor, Kitts,* and *Wood* involved FMVSS 208, which gives manufacturers the choice of various occupant restraint systems. In each case, the court held that the Safety Act impliedly preempted the state common law claim against the automobile manufacturer for failing to equip the automobile with an airbag, by establishing safety standards that granted manufacturers the choice of installing seat belts instead of airbags. To the extent that the state law prohibited a manufacturer from exercising the choice granted to it by FMVSS 208, the state common law claim was preempted. There is no such conflict in the case at bar.

eliminate unreasonably dangerous products. *See Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968). In *Larsen*, the driver of a General Motors car was severely injured in a collision when the steering column of the vehicle was thrust into his head. 391 F.2d at 496-97. The driver brought suit against the manufacturer, alleging the steering column was negligently designed. *Id.* at 497. The Eighth Circuit reversed the district court's grant of summary judgment, and rejected the manufacturer's argument that the plaintiff's action should be limited by the standards in the Safety Act. *Id.* at 506. Addressing the relationship between the Safety Act's preemption clause and savings clause, the court stated:

> It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability. The common law is not sterile and frigid and serves the best interests of society by adapting standards of conduct and responsibility that fairly meet the merging and developing needs of our time. The common law standard of a duty to use reasonable care in light of all the circumstances can at least serve the needs of our society until the legislature imposes higher standards or the courts expand the doctrine of strict liability for tort. The Act is a salutary step in this direction and not an exemption from common law liability.

Id.

Given that the simultaneous compliance with FMVSS 212 and common law standards of care is not impossible with respect to the Volvo truck, and recognizing that such a common law strict liability claim does not stand as an obstacle to the accomplishment and execution of

the full purposes and objectives of Congress, this court finds no basis for finding implied preemption of Plaintiff's claim.

CONCLUSION

For the foregoing reasons, Plaintiff's claim is not preempted by federal law. Defendant's motion for summary judgment on the basis of federal preemption should therefore be denied.

ENTER:

REBECCA R. PALLMEYER
United States Magistrate Judge

Dated: March 6, 1996

Counsel have ten days from the date of service to file objections to this Report and Recommendation with the Honorable Paul E. Plunkett. *See* FED. R. CIV. P. 72(b); 28 U.S.C. § 636(b)(1). Failure to object constitutes a waiver of the right to appeal. *Lorentzen v. Anderson Pest Control,* 64 F.3d 327, 330 (7th Cir. 1995).

[Dated June 20, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NANCY GRACIA,	)	
	)	
Plaintiff,	)	
v.	)	No. 87 C 10005
	)	Hon. Paul E. Plunkett
	)	
VOLVO EUROPA TRUCK, N.V.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This products liability action is before this Court for ruling on objections to five reports and recommendations by Magistrate Judge Pallmeyer. In a report and recommendation dated March 6, 1996, Magistrate Judge Pallmeyer recommended that defendant Volvo Europa Truck, N.V.'s ("Volvo"), motion for summary judgment based on federal preemption be denied. Volvo has filed objections to the report and recommendation. In a second report and recommendation dated March 6, 1996, Magistrate Judge Pallmeyer recommended that Volvo's motion for summary judgment, in which Volvo asserted that the danger of windshield ejection, of which plaintiff Nancy Gracia ("Gracia") complains, was "open and obvious," be denied as well. Volvo has also objected to this report and recommendation.

On March 18, 1996, Magistrate Judge Pallmeyer recommended that Gracia's motion to quash the workers' compensation lien of third party defendant Brook Fur-

niture Rental ("Brook Furniture"), be denied. No objections have been filed to this report and recommendation. In addition, on March 20, 1996, Magistrate Judge Pallmeyer issued two reports and recommendations addressing evidentiary issues. In the first, she made recommendations regarding the parties' motions in limine. Both Gracia and Volvo have filed objections. In the second, she made recommendations regarding Volvo's motion to bar the expert testimony of Frank E. Camps, or in the alternative, to bar certain opinions and conclusions. Volvo has objected to portions of this report and recommendation.

For the reasons set forth below, we reject the March 6, 1996, report and recommendation on federal preemption, and we grant Volvo's motion for summary judgment on that issue. Because that issue is dispositive of this case, the remaining motions, reports and recommendations, and objections are all denied as moot.

Facts

Gracia suffered serious injuries on August 12, 1986, when she was thrown through the windshield of the 1986 Volvo FE6/13 truck ("Volvo truck") in which she was riding. The Volvo truck was a "forward control" vehicle, which means its windshield was flush with its front end, rather than being recessed as on a passenger car. In addition, the Volvo truck had a gross vehicle weight rating ("GVWR") of more than 10,000 pounds. The accident occurred when the Volvo truck struck the rear end of another vehicle traveling in the same direction on the Kennedy expressway. Gracia had been sitting on the engine cover between the driver's seat and the passenger seat. Gracia sued Volvo, the truck's manufac-

turer, asserting that the windshield retention system was unreasonably dangerous because it was inadequate to prevent the windshield from ejecting during foreseeable impacts. Gracia filed suit in the Circuit Court of Cook County on November 19, 1987, and Volvo removed the case to this Court.

Discussion

I. The Standard

Volvo's motions for summary judgment were before the magistrate judge pursuant to Rule 72(b) of the Federal Rules of Civil Procedure. As a result, our review of those portions of the magistrate judge's Report and Recommendation to which timely objections have been filed is *de novo*. Fed. R. Civ. P. 72(b). In providing for *de novo* review, Congress intended to permit whatever reliance a district judge, in the exercise of scund judicial discretion, chooses to place on the magistrate judge's findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676 (1980). We may "accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b).

Rule 56(c) of the Federal Rules of Civil Procedure allows us to grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In considering the evidence submitted by the parties, we do not weigh it or determine the truth of asserted matters. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 249 (1986). We are to view all facts and draw all reasonable inferences in the light most favorable to the non-moving party. *Transamerica Ins. Co. v. South*, 975 F.2d 321, 327 (7th Cir. 1992). "If no reasonable jury could find for the party opposing the motion, it must be granted." *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995) (citing *Anderson*, 477 U.S. at 248).

II. Volvo's Motion for Summary Judgment Based on Federal Preemption

A. The Doctrine of Preemption

Preemption has as its source the supremacy clause of the Constitution, which requires that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the contrary notwithstanding. 11 Art. VI, cl. 2. Federal law does not preempt state law unless Congress intended that it should. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Congress' intention may be gleaned from the explicit language of the federal statute ("express preemption") or implied from the statute's structure and purpose ("implied preemption"). *Id.* Where state law is not expressly preempted, it may be impliedly preempted where:

> the scope of a statute indicates that Congress intended federal law to occupy the field exclusively, *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990), or when state law is in actual conflict with federal law." We have found implied conflict pre-emption where it is "impossible for a private party to comply with both state and federal requirements," *id.* at 79, or where state law "stands as an obstacle to the accomplishment and execu-

> tion of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Freightliner Corp. v. Myrick, 115 S.Ct. 1483, 1487 (1995). *See also Barnett Bank of Marion County v. Nelson*, 116 S.Ct. 1103, 1108 (1996).

B. The Federal Statute and Regulations at Issue

The National Traffic and Motor Vehicle Safety Act (the "Safety Act"), 15 U.S.C. § 1381 *et seq.*, which Congress enacted for the express purpose of reducing traffic accidents and deaths and injuries to persons resulting from traffic accidents, delegates to the Secretary of Transportation the authority to establish "federal motor vehicle safety standards" ("FMVSS").[1] 15 U.S.C. § 1391(2), 1392(a). The Secretary of Transportation has delegated this authority to the National Highway Transportation Safety Administration ("NHTSA"). See 49 C.F.R. § 501.2. The Safety Act contains both a prohibition on the establishment of state standards which are not identical to FMVSS standards, 15 U.S.C. § 1392, and a savings clause which expressly states that compliance with any federal safety standard does not prohibit the imposition of common law liability. 15 U.S.C. § 1397(k).

The NHTSA has promulgated FMVSS 212, which sets windshield retention requirements for motor vehicles.[2]

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[1] In 1994, the Safety Act was recodified, without substantive change, at 49 U.S.C. § 30101 *et seq*. *See* Pub. L. No. 103-272, 1994 H.R. 1758. We use the original citations herein.

[2] The specific requirements of FMVSS 212 are not at issue here.

See 49 C.F.R. § 571.212.Sl. In 1986, as well as today, that standard applied to:

> Passenger cars, and to multipurpose passenger vehicles, trucks, and buses having a gross vehicle weight rating of 10,000 pounds or less. However, it does not apply to forward control vehicles, walk-in van-type vehicles, or to open-body type vehicles with fold-down or removable windshields.

49 C.F.R. § 571.212.S3.

C. Volvo's Objections to the Report and Recommendation

Volvo moved for summary judgment on the ground that Gracia's strict liability claim is preempted by the Safety Act and FMVSS 212, because the NHTSA made a conscious decision not to regulate windshield retention on forward control vehicles or vehicles with GVWR of more than 10,000 pounds. In opposing the motion, Gracia contended that the Safety Act's savings clause, which permits the imposition of common law liability where there is compliance with a federal motor vehicle safety standard, allows her to proceed with her claim against Volvo.

Magistrate Judge Pallmeyer reviewed the 1969 administrative history of the NHTSA's consideration of a proposed amendment to FMVSS 212, which would have included forward control vehicles in the scope of the standard. (Report and Recommendation of March 6, 1996, at 5.) She also considered the Automobile Manufacturers Association, Inc.'s ("AMA"), response to the pro-

posed amendment.[3] (*Id.* at 6-7.) She noted that the AMA had expressed the view that, on trucks, the windshield opening could act as a means of escape and thus would outweigh the advantages of increased windshield retention.[4] (*Id.* at 6.)

In rejecting Volvo's contention that FMVSS 212's exclusion of vehicles of the type at issue here meant the NHTSA had concluded there should be no regulation, the magistrate judge concluded that there was not sufficient evidence that the NHTSA had made an affirmative decision that regulation in this area would be harmful. (*Id.* at 7.) She found that a more reasonable reading of the administrative history indicated that the exclusion was based upon a lack of data demonstrating that an extension of the standard was necessary. *(Id.)* In its objections, Volvo points out that the magistrate judge's analysis does not mention any of the later administrative history of FMVSS 212. That history indicates, according to Volvo, a deliberate decision by the NHTSA to exclude forward control vehicles from FMVSS 212. This decision was grounded on the NHTSA's conclusion that, given the nature of the cab design in forward control vehicles, it was technically impracticable to design windshields which would comply to the standard.[5] Hence, Volvo rea-

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[3] The AMA's response to the proposed amendment was attached to Volvo's Mem. in Support of Mot. for Summary Judgment as Exhibit 6.

[4] The AMA reasoned that in accidents in which heavier trucks overturn onto their sides, the windshield opening is a more accessible escape route than attempting to open the passenger doors. (Volvo Mem., Ex. 6 at 3.5.)

[5] "Impracticable" means "not capable of being carried out." Webster's II New Riverside University Dictionary 615 (1984).

sons, the NHTSA did not leave the field of windshield retention in forward control vehicles unregulated (and therefore open to regulation by the states), but rather preempted the field by expressly excluding forward control vehicles from FMVSS 212.

Gracia did not respond to Volvo's objections.

D. Analysis

We begin our analysis of the preemption issue in this case by examining the language of the Safety Act to determine if state law is expressly preempted. Section 1392(d) of the Safety Act states:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). It is clear from this that state law is expressly preempted in certain circumstances, namely, where a federal standard regarding the same aspect of performance exists. However, where no such federal standard exists, state law is not preempted. *Freightliner*, 115 S.Ct. at 1487.

Here, the aspect of performance at issue is the windshield retention capabilities of forward control vehicles. Thus, before we can decide whether states may impose common law liability on this aspect of performance, we

must determine whether a federal standard exists.[6] FMVSS 212 is undeniably a federal standard regarding motor vehicle windshield retention capabilities. As our next step, then, we must determine its application to forward control vehicles. To do so, we must examine FMVSS 212 itself.

By its plain language, FMVSS 212 includes certain types of motor vehicles and excludes other types, including forward control vehicles. (It is undisputed that the Volvo FE6/13 truck at issue here is a forward control vehicle.) The presence of the exclusionary language must be interpreted to represent a conscious decision by the NHTSA; otherwise the exclusionary language has no meaning.[7] Its presence has a different impact upon our construction of the standard than if the NHTSA had been silent regarding forward control vehicles in FMVSS 212.[8] In other words, if the standard had merely recited the vehicles it included and had said nothing more, we would interpret the NHTSA's silence differently than we interpret its express exclusionary language.

The language of FMVSS 212 is significant to our preemption analysis because it is evidence of the intent of the NHTSA. The intent of the NHTSA matters because

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[6] State common law constitutes a form of regulation subject to preemption. *Cipollone*, 505 U.S. at 521.

[7] It is a basic tenet of statutory construction that we must read a statute or regulation in such a manner as to give effect to all of its language. *In re Lifschultz Fast Freight Corp.*, 63 F.3d 621, 628 (7th Cir. 1995).

[8] This is the case with vehicles with gross vehicle weight ratings [GVWR] over 10,000 pounds, for although they are not included in FMVSS 212, they are also not expressly excluded.

if the NHTSA intended that neither it nor the states should regulate windshield retention in forward control vehicles, then the states may not regulate that field through the imposition of common law liability. In that case, the NHTSA has preempted the field. If, on the other hand, the NHTSA intended to refrain from its own regulation but to permit regulation by the states, then the states may impose common law liability. The answer to this question may well be dispositive of Gracia's claim.

To resolve this issue, we must determine the reason for the NHTSA's exclusion of forward control vehicles. Because FMVSS 212 does not contain an explanation for the exclusion, we turn to the administrative history. In 1969, the NHTSA (or, more accurately, its predecessor, the Federal Highway Administration), published notice of a proposed amendment to FMVSS 212 which would expand its scope beyond passenger vehicles to "multipurpose passenger vehicles, trucks, and buses." (Volvo's Mem., Ex. 5 at 14438.) The notice commented that the proposed amendment was "part of an integrated program aimed at accomplishing the widely accepted goal of keeping occupants within the confines of the passenger compartment during a crash." *(Id.)* In 1972, the NHTSA, in a continuation of the notice of the proposed amendment to FMVSS 212, noted that the amendment would "extend the standard to multipurpose passenger vehicles, trucks, and buses, having a gross vehicle weight rating (GVWR) up to 10,000 pounds." (Volvo Mem., Ex. 7 at 16980.) It went on to comment, however:

> It is recognized that forward control vehicles may have difficulty achieving windshield retention since objects impacted by the front of such a vehicle tend to either impact the windshield it-

> self, or deform the windshield mounting. Recognizing this Problem, the standard would not be applicable to forward control vehicles until September 1, 1978.

(Id.) Two years later, the NHTSA, in a further continuation of the notice of the proposed amendment to FMVSS 212, again stated:

> The NHTSA agrees that the windshield in a forward control vehicle is likely to be instantly contacted in a collision and be unable to restrain passengers . . .

(Volvo Mem., Ex. 8 at 2275.) Then, in 1976, in yet another continuation of the notice of the proposed amendment, the NHTSA explained:

> [F]orward control vehicles and open-body vehicles with fold-down windshields are excluded from the application of the standard because of the impracticability of conforming with the requirement.

(Volvo Mem., Ex. 9 at 36193.) Finally, in 1977, after the proposed amendment had been adopted in a modified form, the NHTSA again commented:

> "Open-body type" vehicles and "forward control" vehicles were excluded because of the impracticability of applying the barrier crash test to these vehicles. General Motors has pointed out that the NHTSA failed to exclude "walk-in van-type" vehicles, which have essentially the same configuration and amount of front-end crush space as forward control vehicles.
>
> . . . On reconsideration of the extended applicability of Standard No. 212 to these vehicles, the agency concludes that the same rationale applies.

> Accordingly, the applicability of Standard No. 212 to walk-in van-type vehicles is withdrawn.

(Volvo Mem., Ex. 4 at 34289.) This led to the current language of FMVSS 212 excluding forward control vehicles, walk-in van-type vehicles, and open-body type vehicles with fold-down or removable windshields.

Under section 1392(d) of the Safety Act, if there were no windshield retention standard, we would undoubtedly conclude that the states could adopt any standard they chose. If FMVSS 212 were silent regarding forward control vehicles, we would be inclined to reach the same result, for the same reasons. Here, however, the standard expressly excludes the type of vehicle at issue, on the grounds that it is not feasible for such vehicles to conform with the standard. We must determine whether, as Gracia argued in opposing Volvo's motion for summary judgment, this determination leaves the states free to regulate windshield retention in forward control vehicles, or whether, as Volvo argues, it means that the NHTSA thinks no one should regulate it.

We think the answer has to be the latter. The NHTSA made a factual determination that requiring forward control vehicles to conform to FMVSS 212 is impracticable given the design of such vehicles. Gracia has presented no evidence in opposition to Volvo's motion which would indicate that the NHTSA lacked sufficient evidence to support its conclusion or that the NHTSA's conclusion was incorrect. Allowing the states to require forward control vehicles to conform to the standard set by FMVSS 212 would be permitting them to adopt a standard which is not identical to the federal standard, and section 1392 of the Safety Act expressly prohibits

this. 15 U.S.C. § 1392(d). For this reason, we conclude that the NHTSA's explicit exclusion of forward control vehicles from FMVSS 212 expressly preempts the aspect of performance of windshield retention for such vehicles.

It is not entirely clear whether Gracia's theory of liability is that Volvo had a duty under the common law to comply with the standard set by FMVSS 212, or whether she contends that Volvo should have complied with some other windshield retention standard. In bringing its motion for summary judgment, Volvo stated only that it anticipated that Gracia would assert Volvo's noncompliance with FMVSS 212. Gracia did not comment on her theory of liability when she opposed that motion. While her failure to disagree with Volvo's assertion suggests her agreement with it, we nonetheless address the question of whether she may proceed using a different standard than the one contained in FMVSS 212.

Once again, we must answer the question in the negative. The Safety Act expressly states that the standards promulgated by the NHTSA are to be minimum safety standards. 15 U.S.C. § 1392(a). What we really have in this case is a conclusion by the responsible federal agency that the minimum safety standard should be that it is not technically feasible to adopt a minimum standard; in other words, the federal standard is that there should be no standard regarding windshield retention for the type of vehicle at issue. Any standard proposed by Gracia would not be identical to this and would run afoul of section 1392(d). Therefore, even if Gracia proposes a standard other than that contained in FMVSS 212, her claim is still preempted.

Our conclusion is bolstered by the Supreme Court's analysis regarding the preemptive effect of another FMVSS in *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483 (1995). The issue in that case was whether truck manufacturers could be held liable for the allegedly negligent design of tractor-trailers because those designs did not include antilock braking systems ("ABS"). *Id.* at 1485. In the two cases consolidated for appeal, the drivers of oncoming vehicles had been seriously injured or killed when tractor-trailers jackknifed into oncoming traffic while attempting to brake suddenly. *Id.*

The NHTSA had promulgated FMVSS 121 in the early 1970s, which imposed stopping distance and vehicle stability requirements on air-brake equipped vehicles. *Id.* at 1486. The stopping distances set forth in FMVSS 121 required the use of ABS devices, and some manufacturers requested that the NHTSA amend the standard because they considered ABS devices dangerous. *Id.* The NHTSA refused. *Id.* The manufacturers then sought review of FMVSS 121 by the Ninth Circuit, which remanded the case to the NHTSA because it concluded that "'the Standard was neither reasonable nor practicable at the time it was put into effect.'" *Id.* (quoting *Paccar, Inc. v NHTSA*, 573 F.2d 632, 640 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978)). The Ninth Circuit found that ABS devices had a high failure rate and might actually serve to increase the dangers to drivers. *Id.* Therefore, the Ninth Circuit suspended FMVSS 121 until the NHTSA compiled sufficient evidence to justify it. *Id.* The NHTSA did not seek to reinstate it and did not adopt any other safety standard governing the same aspects of performance on air-brake equipped vehicles. *Id.*

The Supreme Court determined that, because FMVSS 121 remained suspended, there was no federal safety standard applicable to the aspects of performance at issue, namely, the stopping distance and vehicle stability of trucks and trailers. *Id.* at 1487. As a consequence, the states "remain free to establish, or to continue in effect, their own safety standards concerning those aspect[s] of performance." *Id.* (quoting 15 U.S.C. § 1392(d)). In rejecting the manufacturers' argument that the absence of a federal standard constituted a form of regulation, the Court distinguished between the circumstance before it, where the NHTSA had been silent, and the circumstance in which the NHTSA had determined that there should be no regulation. *Id.* It reasoned:

> Here, there is no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and vehicle stability. Indeed, the lack of federal regulation did not result from an affirmative decision by agency officials to refrain from regulating air brakes. NHTSA did not decide that the minimum, objective safety standard required by 15 U.S.C. § 1392(a) should be the absence of all standards, both federal and state. Rather, the lack of a federal standard stemmed from the decision of a federal court that the agency had not compiled sufficient evidence to justify its regulations.

Id.

Here, we do not have a situation like that in *Freightliner*, where there was a lack of a federal standard.[9] Rather, we have a federal standard which the NHTSA has determined should not apply to forward control vehicles. To use the language of the Court in *Freightliner*, there has been "an affirmative decision by agency officials" that there should be no standard because the nature of the cab design on forward control vehicles makes compliance with the minimum standard set by FMVSS impracticable. The imposition of state common law liability, which could only be based upon the contradictory conclusion that the design of forward control vehicles does not make compliance with the minimum standard of FMVSS 212 impracticable, would be to impose a state standard which is not identical to the federal one. Therefore, Gracia's common law strict liability claim addressing the windshield retention capabilities of forward control vehicles is expressly preempted by section 1392(d) of the Safety Act.

Our determination that Gracia's claim is preempted means we must grant Volvo's motion for summary judgment and enter judgment in its favor. As a consequence, the remaining motions, reports and recommendations, and objections are moot, and we deny them on that basis.

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[9] We might well conclude that there was no applicable federal standard if Volvo's argument was based solely upon the truck at issue having a GVWR of more than 10,000 pounds. As we noted earlier, FMVSS 212 simply does not mention such vehicles. We need not resolve this question, however.

Conclusion

For the foregoing reasons, we reject the magistrate judge's report and recommendation on defendant Volvo Europa Truck, N.V.'s motion for summary judgment on the issue of federal preemption. We find that plaintiff Nancy Gracia's claim is preempted, and we therefore grant Volvo's motion for summary judgment. All other pending motions, reports and recommendations, and objections are denied as moot. This order is final and appealable.

ENTER:

UNITED STATES DISTRICT JUDGE

DATED: June 20, 1996

112 F.3d 291
65 USLW 2704, Prod.Liab.Rep. (CCH) P 14,919

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

Nancy GRACIA, Plaintiff-Appellant,
v.
VOLVO EUROPA TRUCK, N.V., a foreign
corporation, Defendant-Appellee.
No. 96-2774.
United States Court of Appeals, Seventh Circuit.
Argued Dec. 6, 1996—Decided April 24, 1997.
Rehearing and Suggestion for Rehearing
En Banc Denied June 10, 1997.

Passenger brought state common-law strict liability action against manufacturer of forward control truck that weighed over 10,000 pounds, claiming that its windshield retention system was unreasonably dangerous and inadequate to prevent windshield from ejecting during foreseeable impacts. The United States District Court for the Northern District of Illinois, Paul E. Plunkett, J., 1996 WL 351200, granted manufacturer's motion for summary judgment. Passenger appealed. The Court of Appeals, Coffey, Circuit Judge, held that: (1) safety standard promulgated under National Traffic and Motor Vehicle Safety Act, which standard specifically excluded forward control vehicles and vehicles with gross vehicle weight rating of more than 10,000 pounds from windshield retention requirements for motor vehicles during crashes, expressly preempted state common-law strict liability claim, and (2) as matter of first impression, existence of savings provision in Act does not reflect congressional intent that common-law claims are never preempted.

Affirmed.

[1] STATES k18.3
360k18.3
Court interpreting federal statute pertaining to subject traditionally governed by state law will be reluctant to find preemption.

[2] STATES k18.11
360k18.11
Preemption will be found only in those situations where it is the clear and manifest purpose of Congress.

[3] STATES k18.3
360k18.3
Federal preemption of state law can occur in three circumstances: (1) "express preemption" where Congress explicitly preempts state law; (2) implied preemption where Congress has occupied entire field, i.e., "field preemption," and (3) implied preemption where there is actual conflict between federal and state law, i.e., "conflict preemption." See publication Words and Phrases for other judicial constructions and definitions.

[4] PRODUCTS LIABILITY k35.1
313Ak35.1
Safety standard promulgated under National Traffic and Motor Vehicle Safety Act, specifically excluding forward control vehicles and vehicles with gross vehicle weight rating of more than 10,000 pounds from windshield retention requirements for motor vehicles during crashes, expressly preempted state common-law strict liability claim that retention system in forward control truck that weighed more that 10,000 pounds was unreasonably dangerous and inadequate to prevent windshield from ejecting during foreseeable impacts; existence of exclusionary language in safety standard had to be read as

representing conscious decision by National Highway Transportation Safety Administration, and regulatory history revealed that inclusion of such vehicles was considered but rejected. 49 U.S.C.A. § 30103(b)(1); 49 C.F.R. § 571.212.S1.

[4] STATES k18.65
360k18.65
Safety standard promulgated under National Traffic and Motor Vehicle Safety Act, specifically excluding forward control vehicles and vehicles with gross vehicle weight rating of more than 10,000 pounds from windshield retention requirements for motor vehicles during crashes, expressly preempted state common-law strict liability claim that retention system in forward control truck that weighed more that 10,000 pounds was unreasonably dangerous and inadequate to prevent windshield from ejecting during foreseeable impacts; existence of exclusionary language in safety standard had to be read as representing conscious decision by National Highway Transportation Safety Administration, and regulatory history revealed that inclusion of such vehicles was considered but rejected. 49 U.S.C.A. § 30103(b)(1); 49 C.F.R. § 571.212.S1.

[5] CONSUMER PROTECTION k11
92Hk11
Term "standard" as used in National Traffic and Motor Vehicle Safety Act's preemption provision, which bars state standard different from federal motor vehicle safety standard, refers to state common law as well as statutes and regulations. 49 U.S.C.A. § 30103(b)(1).
See publication Words and Phrases for other judicial constructions and definitions.

[5] PRODUCTS LIABILITY k35.1
313Ak35.1
Term "standard" as used in National Traffic and Motor Vehicle Safety Act's preemption provision, which bars state standard different from federal motor vehicle safety standard, refers to state common law as well as statutes and regulations. 49 U.S.C.A. § 30103(b)(1).
See publication Words and Phrases for other judicial constructions and definitions.

[5] STATES k18.65
360k18.65
Term "standard" as used in National Traffic and Motor Vehicle Safety Act's preemption provision, which bars state standard different from federal motor vehicle safety standard, refers to state common law as well as statutes and regulations. 49 U.S.C.A. § 30103(b)(1).
See publication Words and Phrases for other judicial constructions and definitions.

[6] PRODUCTS LIABILITY k35.1
313Ak35.1
Existence of savings provision as well as preemption provision in National Traffic and Motor Vehicle Safety Act does not reflect congressional intent that state common-law claims are never preempted; intention of Congress with regard to savings provision was to prevent manufacturer from having complete defense to common-law action not addressed by federal standard by merely stating that it was in full compliance with all federal safety standards, and common-law claims are preserved only when they do not deviate from federal standards. 49 U.S.C.A. § 30103(b)(1), (e).

[6] STATES k18.65
360k18.65
Existence of savings provision as well as preemption provision in National Traffic and Motor Vehicle Safety Act does not reflect congressional intent that state common-law claims are never preempted; intention of Congress with regard to savings provision was to prevent manufacturer from having complete defense to common-law action not addressed by federal standard by merely stating that it was in full compliance with all federal safety standards, and common-law claims are preserved only when they do not deviate from federal standards. 49 U.S.C.A. § 30103(b)(1), (e).

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Christine L. Olson, D. Kendall Griffith, Hinshaw & Culbertson, Chicago, IL, for amicus curiae Defense Research Institute, Inc.

Before BAUER, COFFEY, and FLAUM, Circuit Judges.

*293 COFFEY, Circuit Judge.

Appellant Nancy Gracia brought a diversity action against Volvo Europa Truck, N.V. ("Volvo") under Illinois common law for personal injuries sustained during a collision while riding in a truck manufactured by Volvo. Pursuant to Federal Rule of Civil Procedure 72(b), the district court judge referred this case to a magistrate judge, without the consent of the parties, for all matters up to and including the filing of the final pretrial order. (R. 151; R. 346 at 3.) After completion of discovery, Volvo filed a motion for summary judgment relying on preemption by a federal safety standard. The magistrate judge recommended denying Volvo's motion. The district court rejected the magistrate judge's report and recommendation, and granted Volvo's motion for summary judgment. Gracia appeals. We affirm the decision of the trial court.

I. BACKGROUND

A. Facts

Gracia worked for Brook Furniture Rental, which leased a 1986 Volvo FE6/13 truck from Ryder Truck Rental. On August 12, 1987, Gracia was riding with two of her co-workers in the cab of the Volvo truck. The truck was a forward control vehicle, with its windshield installed flush with its front end, as contrasted with the recessed windshield on a passenger car. Gracia was seated on the engine cover (often referred to as the "doghouse" or "engine bonnet") located in the front of the vehicle and between the two seats occupied by the driver and another passenger, both co-workers of Gracia. The

seats of the driver and passenger are equipped with seat belts, however, because there is no passenger seat on the engine cover it was not equipped with a seat belt or any other restraining device. Neither of Gracia's co-workers had their seat belts buckled. The truck was traveling on the Kennedy Expressway when it rear-ended a salvage truck traveling in the same direction. Upon impact the Volvo's windshield was dislodged as designed and fell to the pavement. Gracia was catapulted through the windshield opening onto the pavement in front of the truck and sustained a spinal injury. Neither of the other two occupants were ejected from their seats, nor did they sustain serious injuries.

As a result of her injuries, Gracia was admitted to a hospital and received medical treatment. Gracia was unable to work from the date of the injury, August 12, 1987, until March 1, 1988. Thereafter, Gracia returned to part-time employment and a short time later resumed full-time employment assigned to different duties.

Gracia filed suit against Volvo, the truck's manufacturer, alleging that the vehicle was defective under Illinois common law for the windshield retention system was unreasonably dangerous and inadequate to prevent the windshield from ejecting during foreseeable impacts.[1]

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[1] Gracia contends that she would not have sustained any serious injuries if the windshield had been bonded to the frame of the truck's cab by an adhesive material or metal flange and a rubber seal. The subject truck's windshield was held into the frame with rubber, which Gracia believes constitutes a design deficiency and makes the vehicle unreasonably dangerous. However, if the windshield had remained in place Gracia and her two co-workers could have suffered a fractured skull, lacerated face, or serious eye damage by impacting with the window.

B. District Court Proceedings

On November 19, 1987, Gracia filed a product liability suit in the Circuit Court of Cook County. Thereafter, Volvo after establishing diversity jurisdiction had the case removed to the United States District Court for the Northern District of Illinois. Volvo moved for summary judgment arguing that Gracia's strict liability claim is preempted by the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30103(b)(1), which provides that when a federal motor vehicle safety standard is in effect, any non-identical state safety standard is not applicable and is therefore, not binding on manufacturers. The magistrate judge found that the relevant federal safety standard regarding windshield retention requirements did not apply to the type of truck at issue in this case and recommended denial of the motion for summary judgment. The magistrate judge reasoned that the agency had excluded trucks like the *294 one at issue from the standard's requirements, not because of an affirmative decision that there should be no regulation, but because of a lack of data demonstrating the need for that type of vehicle to be covered by the standard. (Report and Recommendation of March 6, 1996, at 7.) The district court rejected the magistrate judge's report and recommendation and granted the motion for summary judgment finding federal preemption. If it was the agency's intent to specifically exclude vehicles such as the one at issue from having to meet windshield retention requirements and the National Traffic and Motor Vehicle Safety Act's preemption clause precludes common law claims, then the granting of this motion was proper.

II. DISCUSSION

A. Summary Judgment

"Summary judgment is appropriate when the record, viewed in a light most favorable to the non-moving party, reveals that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Vector-Springfield Properties, Ltd. v. Central Illinois Light Co., Inc., 108 F.3d 806, 809 (7th Cir.1997) (citing Fed.R.Civ.P. 56(c)). We review the trial court's order granting summary judgment de novo. Id. at 809. Upon the filing of a motion for summary judgment, the burden shifts to the non-moving party to demonstrate with specific evidence that a triable issue of fact remains on issues on which the non-movant bears the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The mere existence of some alleged factual dispute is insufficient to defeat an otherwise properly supported motion for summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In this case, the parties agree on the facts relating to the accident and injury, but dispute whether Gracia's tort claim is preempted by federal law.

B. Federal Preemption

[1][2][3] The Supremacy Clause of the Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Pursuant to the Supremacy Clause, Congress has the authority to pre-

empt state law. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 (1986); Time Warner Cable v. Doyle, 66 F.3d 867, 874 (7th Cir.1995), cert. denied, ___ U.S. ___, 116 S.Ct. 974, 133 L.Ed.2d 894 (1996). "In determining whether the Congress has preempted state law, our task is to discern congressional intent." Time Warner Cable, 66 F.3d at 874 (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381-82, 112 S.Ct. 2031, 2036, 119 L.Ed.2d 157 (1992)). A court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663-64, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993). Therefore, preemption will be found only in those situations where it is "the clear and manifest purpose of Congress." Id. at 664, 113 S.Ct. at 1737 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). Federal preemption of state law can occur in three circumstances: (1) express preemption where Congress explicitly preempts state law; (2) implied preemption where Congress has occupied the entire field (field preemption); and (3) implied preemption where there is an actual conflict between federal and state law (conflict preemption). English v. General Elec. Co., 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990); American Agriculture Movement, Inc. v. Board of Trade of Chicago, 977 F.2d 1147, 1154 (7th Cir.1992). In Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517, 112 S.Ct. 2608, 2618, 120 L.Ed.2d 407 (1992), the Supreme Court suggested that a Congressional decision to include an explicit preemption provision in legislation forecloses a finding of implied preemption from that legislation, so

long as the provision "provides a reliable indicium of congressional intent with respect to state authority." Some three years later, in Freightliner Corp. v. Myrick, 514 U.S. *295 280, 288-90, 115 S.Ct. 1483, 1488, 131 L.Ed.2d 385 (1995), the Court disagreed with that suggestion and proceeded to address the merits of the defendants' implied preemption argument. The Court explained that, "[a]t best, Cipollone supports an inference that an express pre-emption clause forecloses implied preemption; it does not establish a rule." Id.

C. National Traffic and Motor Vehicle Safety Act

Congress enacted the National Traffic and Motor Vehicle Safety Act ("Safety Act") with the express purpose in mind of trying "to reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101.[2] In order to accomplish this objective, the Safety Act delegates to the Secretary of Transportation the authority to establish "federal motor vehicle safety standards" ("FMVSS" or "safety standards") that "shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms." 49 U.S.C. § 30111(a). The Secretary has delegated this duty to the National Highway Transportation Safety Administration ("NHTSA"). 49 C.F.R. § 1.50; see 49 C.F.R. § 501.2.[3]

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[2] The Safety Act was previously codified at 15 U.S.C. § 1381 et seq., but in 1994 was recodified without substantive change at 49 U.S.C. § 30101 et seq.

[3] The Safety Act is a statute, while the federal motor vehicle safety standards are regulations established by the NHTSA; however, they are consistently referred to as "safety standards" and, therefore, this term is used to refer to them throughout this opinion.

The safety standard relevant to this appeal is FMVSS 212, which "establishes windshield retention requirements for motor vehicles during crashes." 49 C.F.R. § 571.212.S1.[4] This standard does not apply to vehicles

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[4] The relevant portion of the safety standard states:

> S2. Purpose. The purpose of this standard is to reduce crash injuries and fatalities by providing for retention of the vehicle windshield during a crash, thereby utilizing fully the penetration-resistance and injury-avoidance properties of the windshield glazing material and preventing the ejection of occupants from the vehicle.
>
> S3. Application. This standard applies to passenger cars, and to multipurpose passenger vehicles, trucks, and buses having a gross vehicle weight rating of 4536 kilograms [10,000 pounds] or less. However, it does not apply to forward control vehicles, walk-in van-type vehicles, or to open-body type vehicles with fold-down or removable windshields.
>
> S4. Definition. Passive restraint system means a system meeting the occupant crash protection requirements of S5. of Standard No. 208 by means that require no action by vehicle occupants.
>
> S5. Requirements. When the vehicle traveling longitudinally forward at any speed up to and including 48 kilometers [30 miles] per hour impacts a fixed collision barrier that is perpendicular to the line of travel of the vehicle, under the conditions of S6, the windshield mounting of the vehicle shall retain not less than the minimum portion of the windshield periphery specified in S5.1 and S5.2.
>
> S5.1 Vehicles equipped with passive restraints. Vehicles equipped with passive restraint systems shall retain not less than 50 percent of the portion of the windshield periphery on each side of the vehicle longitudinal centerline.
>
> S5.2 Vehicles not equipped with passive restraints. Vehicles not equipped with passive restraint systems shall retain not less than 75 percent of the windshield periphery.

49 C.F.R. § 571.212 (emphasis in original).

that have a gross vehicle weight rating of more than 10,000 pounds and, furthermore, explicitly excludes forward control vehicles. 49 C.F.R. § 571.212.S3. It is uncontroverted that this federal safety standard does not apply to the truck at issue because it not only exceeds 10,000 pounds, but it is also a forward control vehicle.

The Federal Safety Act contains an express preemption clause that states:

> When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.

49 U.S.C. § 30103(b)(1) (emphasis added). However, the act also contains a savings clause that reads: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e). *296 A motor vehicle safety standard is broadly defined as "a minimum standard for motor vehicle or motor vehicle equipment performance." 49 U.S.C. § 30102(a)(9).

D. Preemption Analysis

[4] Volvo asserted that Gracia's state common law claim is preempted by FMVSS 212 both expressly and by implication. The district court agreed and granted Volvo's motion for summary judgment. Gracia opposed Volvo's summary judgment motion on several grounds. First, in reliance on Myrick, Gracia asserts that since the

windshield retention requirements of FMVSS 212 do not apply to the Volvo truck, there is no federal safety standard on windshield retention for this type of vehicle and therefore, no express preemption. Gracia further contends that, because there is no relevant standard, there also cannot be any implied conflict with state common law standards. However, Gracia's reliance on Myrick is misplaced, as that case fails to support her contention.

The facts and reasoning in Myrick do not preclude a finding of preemption in this case, and in fact, support the determination that Gracia's state common law claim is preempted. The Myrick Court in its decision likewise analyzed the federal Safety Act, but specifically dealt with FMVSS 121, which concerns stopping distances and vehicle stability requirements. In Myrick, two cases were consolidated in which trucks jackknifed and collided with oncoming plaintiffs, allegedly due to the absence of anti-lock braking systems ("ABS"). State common law design defects claims were brought against manufacturers of the tractor-trailers. The Court found that the common law actions were neither expressly nor implicitly preempted because there was no federal standard dealing with the vehicles in question. Prior to Myrick, the Ninth Circuit had suspended standard 121 until the NHTSA could compile sufficient evidence showing that the use of ABS on trucks and trailers would not increase the possibility of danger. Paccar, Inc. v. NHTSA, 573 F.2d 632 (9th Cir.1978). In response, the NHTSA amended standard 121 so that it no longer applied to trucks and trailers. Myrick, 514 U.S. at 283-86, 115 S.Ct. at 1486. In Myrick, the Court concluded that:

> Indeed, the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes. NHTSA did not decide that the minimum, objective safety standard required by 15 U.S.C. § 1392(a) should be the absence of all standards, both federal and state. Rather, the lack of a federal standard stemmed from the decision of a federal court that the agency had not compiled sufficient evidence to justify its regulation.

Id. at 286-87, 115 S.Ct. at 1487 (footnote omitted). The Court found that standard 121 simply said nothing, one way or the other, about the use of ABS devices for tractor-trailers and concluded that there is no federal standard to conflict with. Id. at 288-90, 115 S.Ct. at 1488.

In contrast, here there is a specific federal standard addressing windshield retention for the truck at issue, in which the NHTSA determined that this type of vehicle should be exempt from the affixing requirement. The Supreme Court has held that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 384, 103 S.Ct. 1905, 1912, 76 L.Ed.2d 1 (1983) (emphasis added); see also Myrick, 514 U.S. at 286-88, 115 S.Ct. at 1487. In federal safety standard 212, which we analyze in this case, the NHTSA specifically listed which type of vehicles were excluded from complying with the windshield retention requirements, rather than merely re-

citing the vehicles that were covered by the standard.[5] "[W]e have a duty to 'give effect, if possible, to every clause and word of a statute.'" In re Lifschultz Fast Freight Corp., 63 F.3d 621, 628 (7th Cir.1995) (quoting Moskal v. United States, 498 U.S. 103, 109, 111 S.Ct. 461, 466, 112 L.Ed.2d 449 *297 (1990)). Therefore, the existence of the exclusionary language in the federal safety standard mandates that we interpret it as representing a conscious decision by the NHTSA. An examination of the legislative history further bolsters that it was the intent of the NHTSA to exclude trucks such as the one at issue in this case from having to meet any windshield retention requirements.

In 1969 the NHTSA's predecessor, the Federal Highway Administration, proposed to extend standard 212 to cover vehicles such as the truck at issue. 34 Fed.Reg. 14438 (1969) (proposed Sept. 10, 1969); (R. 216, Ex. 5.) The response submitted in opposition to this amendment by the Automobile Manufacturers Association ("AMA") explained that the configuration of forward control vehicles renders any level of windshield retention basically meaningless because the impact either directly involves the windshield or results in severe deformation of the windshield mounting structure. (R. 216, Ex. 6, AMA's Comments on Proposed Amendment, at S70-3.4 and S70-3.5.) The AMA further explained that the windshield has been identified as an important means of escape from a truck, particularly when it comes to rest on its side after an accident. (Id.) After receiving responses such as these,

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[5] The standard specifically excludes forward control vehicles, walk-in van-type vehicles, and open-body-type vehicles with fold-down or removable windshields. 49 C.F.R. § 571.212.S3.

the NHTSA decided that forward control vehicles, such as the truck at issue, would not be required to comply with the standard until September 1, 1978. 37 Fed.Reg. 16980 (1972) (recognizing that forward control vehicles would have difficulty in retaining windshields because of reasons given by AMA). The NHTSA finally determined in 1977 that given the design of forward control vehicles it was both technically impracticable to design windshields which could comply with the standards and impracticable to apply the standard's barrier crash tests to these vehicles. 42 Fed.Reg. 34289 (1977); 41 Fed.Reg. 36193 (1976).

The district court correctly determined that Gracia's common law claim was preempted and stated that "there has been 'an affirmative decision by agency officials' that there should be no standard because the nature of the cab design on forward control vehicles makes compliance with the minimum standard set by FMVSS impracticable." (R. 346, Memorandum Opinion and Order of June 20, 1996, at 15-16 (quoting Myrick, 514 U.S. at 286-87, 115 S.Ct. at 1487).) Allowing a state common law standard on windshield retention would, accordingly, be a standard that is not identical to the federal one. Therefore, we conclude that the NHTSA's explicit exclusion of forward control vehicles from having to meet any windshield retention requirements in federal safety standard 212, along with the inapplicability of the standard to vehicles over 10,000 pounds, expressly preempts Gracia's state common law action.

E. Safety Standard and Common Law

[5] Gracia also argues that her common law claims are not preempted by the Safety Act's requirement that

states only have identical motor vehicle safety standards. Gracia believes that the preemption of non-identical state safety standard applies only to state statutes and regulations, while common law actions remain available. In Myrick, the Court did not reach the issue of whether the preemption clause's use of the term "standard" preempts only state statutes and regulations, but not common law actions.[6] Myrick, 514 U.S. at 287 n. 3, 115 S.Ct. at 1487 n. 3. However, other cases have interpreted similar language in other preemption clauses and found that the term "standard" not only refers to state statutes and regulations, but can also refer to common law. See, e.g., CSX Transportation, 507 U.S. at 664, 113 S.Ct. at 1737-38; Cipollone, 505 U.S. at 521-22, 112 S.Ct. at 2620. Therefore, Gracia's argument is unpersuasive and does not alter our conclusion that her claim is preempted.

F. Congressional Intention and Legislative History

[6] Gracia additionally argues that reading the preemption and savings clause in conjunction leads to the conclusion that Congress did not intend for common law actions to ever be preempted. In support of this *298 claim, she contends that the legislative history suggests that common law claims are not preempted and thereby precludes a finding of a "clear and manifest purpose" of Congress to preempt.

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[6] The Myrick Court also found it unnecessary to reach the issue of whether the savings clause prevents manufacturers from using a federal safety standard to immunize itself from state common law liability. Myrick, 514 U.S. at 287 n. 3, 115 S.Ct. at 1487 n. 3.

Because this is a case of first impression for this court, we believe it is helpful to review the legislative history which establishes that state common law claims can be preempted by a federal safety standard. The legislative history shows that the House Committee amended the original Safety Act bill to insert the savings clause. The House Committee Report explained the purpose of the savings clause in stating "it is intended and this subsection specifically establishes that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." H.R. Rep. No. 89-1776, at 24 (1966).

The Safety Act, in order that it might achieve its primary purpose of reducing traffic injuries and fatalities, also had the objective of establishing uniform national safety standards and adequate enforcement of those standards, as the legislative history indicates. S.Rep. No. 89-1301, at 12 (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2720. We agree that when a state requirement is not identical to the federal standard it would obviously impede the objective of uniform national standards. The NHTSA has decided that forward control vehicles and vehicles that weigh more than 10,000 pounds should be exempt from meeting windshield retention requirements.

If Gracia's common law claim was not preempted, then manufacturers would be placed in a position where they could be subject to varying standards from state to state, which could not all be complied with simultaneously. For instance, one state's common law could require stringent windshield retention, while another state's could require that windshields not be permanently affixed. If this were the case, then the manufacturer would be subject to

liability if the windshield were ejected in an accident in one state, but in another state would be liable if a windshield remained intact and a trapped victim were unable to escape from the vehicle.

The intention of Congress was not to preserve common law claims when they conflict with NHTSA standards, but to prevent a manufacturer from having a complete defense to a common law action not addressed by a NHTSA standard by merely stating that it is in full compliance with all federal safety standards.[7] Additionally, the Supreme Court has held that similar savings clauses do not preserve conflicting or non-identical state common law actions from preemption. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-85, 112 S.Ct. 2031, 2037, 119 L.Ed.2d 157 (1992); International Paper Co. v. Ouellette, 479 U.S. 481, 493-94, 107 S.Ct.

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[7] Gracia's dependence on language pertaining to the savings clause from both the House Report and statements from the floor of the Senate does not contradict this contention. The House Report stated "[i]t is intended and [the savings clause] specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." H.R.Rep. No. 89-1776, at 24 (1966). Gracia also ineffectively seeks support from Senator Magnuson's statement that:

> The Senate conferees accepted the House provision that compliance with Federal standards does not exempt any person from common law liability. This provision makes explicit, in the bill, a principle developed in the Senate report. This provision does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with Federal standards. No court rules of evidence are intended to be altered by this provision.

112 Cong.Rec. 21, 487 (1966).

805, 812-13, 93 L.Ed.2d 883 (1987). Therefore, the only way effect can be given to both sections is for common law claims to be preserved only when they do not deviate from the standards set forth by the NHTSA.[8]

III. CONCLUSION

Having concluded that Gracia's common law tort action is preempted by FMVSS 212, *299 we find moot and need not analyze the alternative arguments that Volvo raises in support of its contention that the district court's decision be affirmed on other grounds. We AFFIRM the district court's decision to grant Volvo's motion for summary judgment based on federal preemption.

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[8] Accordingly, a manufacturer who complied with all of the safety standards could still be sued under the common law for a defect that was not discussed and covered by the safety standards.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 10, 1997.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

NANCY GRACIA,

Plaintiff-Appellant,

No. 96-2774 v.

VOLVO EUROPA TRUCK, N.V.,
a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 10005—Paul E. Plunkett, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellant Nancy Gracia, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

49 U.S.C. § 30101 (1996)

Purpose and policy

The purpose of this chapter is to reduce traffic accidents and deaths and injuries resulting from traffic accidents. Therefore it is necessary –

(1) to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce; and

(2) to carry out needed safety research and development.

49 U.S.C. § 30103(b) (1996)

(b) PREEMPTION. – (1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

49 U.S.C. § 30103(e) (1996)

(e) COMMON LAW LIABILITY. – Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

49 C.F.R. § 571.121 (1996)

S3. *Application.* This standard applies to trucks, buses, and trailers equipped with air brake systems. However, it does not apply to:

> **(e)** Any trailer that has a GVWR of more than 120,000 pounds and whose body conforms to that described in the definition of heavy hauler trailer set forth in S4;

49 C.F.R. § 571.208 (1996)

S1. Scope. This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. Purpose. The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, and by specifying equipment requirements for active and passive restraint systems.

S3. Application. This standard applies to passenger cars, multipurpose passenger vehicles, trucks, and buses. In addition, S9, Pressure vessels and explosive devices, applies to vessels designed to contain a pressurized fluid or gas, and to explosive devices, for use in the above

types of motor vehicles as part of a system designed to provide protection to occupants in the event of a crash. Notwithstanding any language to the contrary, any vehicle manufactured after March 19, 1997 and before September 1, 2001 that is subject to a dynamic crash test requirement conducted with unbelted dummies may meet the requirements specified in S13 instead of the applicable unbelted requirement. For vehicles manufactured before September 1, 1998, compliance with S13 shall, for purposes of Standards Nos. 203 and 209, be deemed as compliance with the unbelted frontal barrier requirements of S5.1 of this section.

S4. General requirements.

S4.1 Passenger cars.

S4.1.1 Passenger cars manufactured from January 1, 1972, to August 31, 1973. Each passenger car manufactured from January 1, 1972, to August 31, 1973, inclusive, shall meet the requirements of S4.1.1.1, S4.1.1.2, or S4.1.1.3. A protection system that meets the requirements of S4.1.1.1, or S4.1.1.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.1.3.

S4.1.1.1 First option—complete passive protection system. The vehicle shall meet the crash protection requirements of S5. by means that require no action by vehicle occupants.

S4.1.1.2 Second option—lap belt protection system with belt warning. The vehicle shall—

(a) At each designated seating position have a Type 1 seatbelt assembly or a Type 2 seatbelt assembly with a

detachable upper torso portion that conforms to S7.1 and S7.2 of this standard;

(b) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3; and

(c) Meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with respect to anthropomorphic test devices in each front outboard designated seating position restrained only by Type 1 seat belt assemblies.

S4.1.1.3 Third option—lap and shoulder belt protection system with belt warning.

S4.1.1.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a Type 2 seatbelt assembly that conforms to § 571.209 and S7.1 and S7.2 of this standard, with either an integral or detachable upper torso portion, and a seatbelt warning system that conforms to S7.3;

(b) At each designated seating position other than the front outboard positions, have a Type 1 or Type 2 seat belt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard; and

(c) When it perpendicularly impacts a fixed collision barrier, while moving longitudinally forward at any speed up to and including 30 m.p.h., under the test conditions of S8.1 with anthropomorphic test devices at each front outboard position restrained by Type 2 seatbelt assemblies, experience no complete separation of any load-bearing element of a seatbelt assembly or anchorage.

S4.1.1.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seatbelt assembly that conforms to § 571.209 and to S7.1 and S7.2 of this standard, and at each front outboard designated seating position have a seatbelt warning system that conforms to S7.3.

S4.1.2 Passenger cars manufactured on or after September 1, 1973, and before September 1, 1986. Each passenger car manufactured on or after September 1, 1973, and before September 1, 1986, shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

S4.1.2.1 First option—frontal/angular automatic protection system. The vehicle shall:

(a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) Either

(1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that con-

forms to Standard No. 209 and S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 Second option—head-on automatic protection system. The vehicle shall—

(a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

S4.1.2.3 Third option—lap and shoulder belt protection system with belt warning.

S4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall—

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a

Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and at each front designated seating position have a seat belt warning system that conforms to S7.3.

S4.1.3 Passenger cars manufactured on or after September 1, 1986, and before September 1, 1989.

S4.1.3.1 Passenger cars manufactured on or after September 1, 1986, and before September 1, 1987.

S4.1.3.1.1 Subject to S4.1.3.1.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1986, and before September 1, 1987, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did

not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.1.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars, specified in S4.1.3.1.1 complying with the requirements of S4.1.2.1 shall be not less than 10 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1983, and before September 1, 1986, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.1.1.

S4.1.3.1.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.1.2(a) or its annual production under S4.1.3.1.2(b).

S4.1.3.2 Passenger cars manufactured on or after September 1, 1987, and before September 1, 1988.

S4.1.3.2.1 Subject to S4.1.3.2.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1987, and before September 1, 1988, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.2.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.2.1 complying with

the requirements of S4.1.2.1. shall be not less than 25 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1984, and before September 1, 1987, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.2.1.

S4.1.3.2.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.2.2(a) or its annual production under S4.1.3.2.2(b).

S4.1.3.3 Passenger cars manufactured on or after September 1, 1988, and before September 1, 1989.

S4.1.3.3.1 Subject to S4.1.3.3.2 and S4.1.3.4, each passenger car manufactured on or after September 1, 1988, and before September 1, 1989, shall comply with the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.3.2 Subject to S4.1.3.4 and S4.1.5, the amount of passenger cars specified in S4.1.3.3.1 complying with the requirements of S4.1.2.1 shall be not less than 40 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1985, and before September 1, 1988, by each manufacturer or

(b) The manufacturer's annual production of passenger cars during the period specified in S4.1.3.3.1.

S4.1.3.3.3 A manufacturer may exclude convertibles which do not comply with the requirements of S4.1.2.1, when it is calculating its average annual production under S4.1.3.3.2(a) or its annual production under S4.1.3.3.2(b).

S4.1.3.4 Calculation of complying passenger cars.

(a) For the purposes of calculating the numbers of cars manufactured under S4.1.3.1.2, S4.1.3.2.2, or S4.1.3.3.2 to comply with S4.1.2.1:

(1) Each car whose driver's seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose front right seating position will comply with the requirements of S4.1.2.1(a) by any means is counted as 1.5 vehicles, and

(2) Each car whose driver's seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose right front seat seating position is equipped with a manual Type 2 seat belt is counted as one vehicle.

(b) For the purposes of complying with S4.1.3.1.2, a passenger car may be counted if it:

(1) Is manufactured on or after September 1, 1985, but before September 1, 1986, and

(2) Complies with S4.1.2.1.

(c) For the purposes of complying with S4.1.3.2.2, a passenger car may be counted if it:

(1) Is manufactured on or after September 1, 1985, but before September 1, 1987,

(2) Complies with S4.1.2.1, and

(3) Is not counted toward compliance with S4.1.3.1.2.

(d) For the purposes of complying with S4.1.3.3.2, a passenger car may be counted if it:

(1) Is manufactured on or after September 1, 1985, but before September 1, 1988,

(2) Complies with S4.1.2.1, and

(3) Is not counted toward compliance with S4.1.3.1.2 or S4.1.3.2.2.

S4.1.3.5. Passenger cars produced by more than one manufacturer.

S4.1.3.5.1 For the purposes of calculating average annual production of passenger cars for each manufacturer and the amount of passenger cars manufactured by each manufacturer under S4.1.3.1.2, S4.1.3.2.2 or S4.1.3.3.2, a passenger car produced by more than one manufacturer shall be attributed to a single manufacturer as follows, subject to S4.1.3.5.2:

(a) A passenger car which is imported shall be attributed to the importer.

(b) A passenger car manufactured in the United States by more than one manufacturer, one of which also markets the vehicle, shall be attributed to the manufacturer which markets the vehicle.

S4.1.3.5.2 A passenger car produced by more than one manufacturer shall be attributed to any one of the vehicle's manufacturers specified by an express written contract, reported to the National Highway Traffic Safety

Administration under 49 CFR Part 585, between the manufacturer so specified and the manufacturer to which the vehicle would otherwise be attributed under S4.1.3.5.1.

S4.1.4 Passenger cars manufactured on or after September 1, 1989, but before September 1, 1996.

S4.1.4.1 Except as provided in S4.1.4.2, each passenger car manufactured on or after September 1, 1989 shall comply with the requirements of S4.1.2.1. Any passenger car manufactured on or after September 1, 1989 and before September 1, 1993 whose driver's designated seating position complies with the requirements of S4.1.2.1(a) by means not including any type of seat belt and whose right front designated seating position is equipped with a manual Type 2 seat belt so that the seating position complies with the occupant crash protection requirements of S5.1, with the Type 2 seat belt assembly adjusted in accordance with S7.4.2, shall be counted as a vehicle complying with S4.1.2.1. A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not know in the exercise of due care that such vehicle is not in conformity with this standard.

S4.1.4.2 (a) Each passenger car, other than a convertible, manufactured before December 11, 1989 may be equipped with, and each passenger car, other than a convertible, manufactured on or after December 11, 1989 and before September 1, 1990 shall be equipped with a Type 2 seat belt assembly at every forward-facing rear outboard designated seating position. Type 2 seat belt assemblies installed pursuant to this provision shall

comply with Standard No. 209 (49 CFR 571.209) and with S7.1.1 of this standard.

(b) Except as provided in S4.1.4.2.1 and S4.1.4.2.2, each passenger car, other than a convertible, manufactured on or after September 1, 1990 and each convertible passenger car manufactured on or after September 1, 1991 shall be equipped with an integral Type 2 seat belt assembly at every forward-facing rear outboard designated seating position. Type 2 seat belt assemblies installed in compliance with this requirement shall comply with Standard No. 209 (49 CFR 571.209) and with S7.1 and S7.2 of this standard. If a Type 2 seat belt assembly installed in compliance with this requirement incorporates any webbing tension-relieving device, the vehicle owner's manual shall include the information specified in S7.4.2(b) of this standard for the tension relieving device, and the vehicle shall comply with S7.4.2(c) of this standard.

(c) As used in this section, "rear outboard designated seating position" means any "outboard designated seating position" (as that term is defined at 49 CFR 571.3) that is rearward of the front seat(s), except any designated seating position adjacent to a walkway that is located between the seat and the near side of the vehicle and is designed to allow access to more rearward seating positions.

S4.1.4.2.1 Any rear outboard designated seating position with a seat that can be adjusted to be forward-facing and to face some other direction shall either:

(i) Meet the requirements of S4.1.4.2 with the seat in any position in which it can be occupied while the vehicle is in motion; or

(ii) When the seat is in its forward-facing position, have a Type 2 seat belt assembly with an upper torso restraint that conforms to S7.1 and S7.2 of this standard and that adjusts by means of an emergency locking retractor that conforms with Standard No. 209 (49 CFR § 571.209), which upper torso restraint may be detachable at the buckle, and, when the seat is in any position in which it can be occupied while the vehicle is in motion, have a Type 1 seat belt or the pelvic portion of a Type 2 seat belt assembly that conforms to S7.1 and S7.2 of this standard.

S4.1.4.2.2 Any rear outboard designated seating position on a readily removable seat (that is, a seat designed to be easily removed and replaced by means installed by the manufacturer for that purpose) in a vehicle manufactured on or after September 1, 1992 shall meet the requirements of S4.1.4.2 and may use an upper torso belt that detaches at either its upper or lower anchorage points, but not both anchorage points, to meet those requirements. The means for detaching the upper torso belt may use a pushbutton action.

49 C.F.R. § 571.212 (1996)

S3. *Application.* This standard applies to passenger cars, and to multipurpose passenger vehicles, trucks, and buses having a gross vehicle weight rating of 10,000 pounds or less.

S4. *Requirements.* Except for open body type vehicles with a folding or removable windshield and forward control vehicles, the windshield mounting of each vehicle

shall retain not less than 50 percent of that portion of the windshield periphery on each side of the vehicle longitudinal centerline when tested in accordance with the procedures of §5. The requirement shall be met at any ambient temperature from 15ºF. to 110ºF.

S5. ***Test procedure.***

S5.1 Load the vehicle as specified by the applicable provisions of section S8.1 of Motor Vehicle Safety Standard No. 208, including a 50th percentile test dummy as specified in Part 572 of this chapter at each front outboard designated seating position and at any other position whose protection system is required to be tested by a dummy under the provisions of Standard No. 208. Each dummy shall be restrained only by means that are installed in the vehicle for protection at its seating position and that require no action by the vehicle occupant.

S5.2 With the vehicle traveling longitudinally forward at any speed up to and including 30 mph, impact a fixed collision barrier that is perpendicular to the line of travel of the vehicle.

(2)

Supreme Court, U.S.
FILED
DEC 18 1997
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No. 97-823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NANCY GRACIA,

Petitioner,

v.

VOLVO EUROPA TRUCK, N.V.,
a foreign corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT VOLVO EUROPA TRUCK, N.V. IN OPPOSITION

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47 pp

QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals correctly decided that Petitioner's personal injury claim against Volvo for an alleged defective truck windshield retention design was preempted by the National Highway Transportation Safety Administration and the National Traffic and Motor Vehicle Safety Act, Standard 212, which regulated windshield retention in the subject truck, in accord with the principles and holding expressed by this Court in *Freightliner Corp. v. Myrick,* 514 U.S. 280, 115 S. Ct. 1483 (1995).

RULE 29.6 STATEMENT

Respondent Volvo Europa Truck, N.V., a corporation organized and existing under the laws of Belgium, is a wholly owned subsidiary of A.B. Volvo whose shares are traded on a public foreign exchange. Other major subsidiaries, affiliates and non-wholly owned subsidiaries of A.B. Volvo include:

AB O Annerstedt

BCP Group

Export Tool & Welding, Ltd.

Forsakingsaktielbolaget Volva

Volvo-Auto Ab

Prevost Bus, Ltd.

Society Franco-Cedes de Madeiras-PR.

Steyr Bus Gsmbh

Swedish Motor Assemblies Sdn. Bhd.

Thai-Swedish Assembly Co. Ltd.

VL Bus Asia (Pte) Ltd.

Volvo Australia Pty. Ltd.

Volvo Automobile (Schweiz) AG

Volvo Automobiles France S.A.

Volvo Bedrijfswagens B.V.

Volvo Cars Europe Marketing NV

Volvo Cars Intercontinental AB

Volvo Distribuidora S.A.

Volvo Group Insurance Forsakrings AB

Volvo Hydraulics Corporation

Volvo Italia SpA

Volvo Japan Corporation

Volvo Lastebiler og Busser Norge AS

Volvo Lastvagner Sverige AB

Volvo Norge A/S

Volvo North America, Inc.

Volvo Nutzfahreuge Deutschland GmbH

VME Group NV

VME Industries NA

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OPINIONS BELOW

The unreported memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, granting Volvo's motion for summary judgment based on federal preemption, is attached to Gracia's petition as Appendix B.

The Seventh Circuit Court of Appeals affirmed the judgment of the District Court on April 24, 1997. *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291 (7th Cir. 1997), a copy of which is attached to Gracia's petition as Appendix C.

No judge in active service on the Seventh Circuit requested a vote on *Gracia's* suggestion for rehearing *en banc*. All of the judges of the original Seventh Circuit panel voted to deny Gracia's petition for rehearing on June 10, 1997. The June 10, 1997 order of the Seventh Circuit denying said petition is attached as Appendix C-1.

STATEMENT OF JURISDICTION

Gracia seeks to invoke this Court's discretionary jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rules 10(a) and (c). The opinion of the Seventh Circuit was filed on April 24, 1997. The order of the Seventh Circuit denying Gracia's petition for rehearing and suggestion for rehearing *en banc* was entered on June 10, 1997. Gracia's petition for a writ of certiorari was docketed with this Court on November 18, 1997.

Gracia's claim when initially filed invoked the jurisdiction of the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1332(a)(2) and 28 U.S.C. § 1441(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. CONST. ART. VI, cl.2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. 15 U.S.C. § 1392(d), repealed and recodified as 49 U.S.C. § 30103(b) (1994) (hereinafter referred to as "the Safety Act"). Appendix A-4.

3. 15 U.S.C. § 1397(k), repealed and recodified as 49 U.S.C. § 30103(e) (1994) (hereinafter referred to as "the Safety Act"). Appendix A-4.

4. 49 C.F.R. § 571.212 (1987) (hereinafter referred to as "FMVSS 212" or "Safety Standard 212"). Because Gracia has failed to set forth Standard 212 in its entirety in her Appendix D, specifically excluding relevant portions of the application section, S3, Volvo attaches hereto Standard 212 in its entirety in Appendix A-1 to A-3.

BRIEF FOR THE RESPONDENT IN OPPOSITION

This case presents no compelling reason for this Court to exercise its discretionary jurisdiction and accept Gracia's petition. U.S. Sup.Ct.R. 10. The District Court and the Seventh Circuit followed and correctly applied the reasoning of this Court as set forth in *Freightliner Corporation v. Myrick*, 514 U.S. 280 (1995) and *Cipolone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), in deciding that Gracia's product liability action against Volvo based on an alleged defect in the design of a truck windshield retention system was preempted by the National Highway Transportation Safety Administration ("NHTSA"), and the National Traffic and Motor Vehicle Safety Act, ("Safety Act").[1] Appendix A-1 to A-3. The District Court and the Seventh Circuit correctly concluded that the NHTSA specifically and directly addressed Gracia's design defect allegations under Federal Motor Vehicle Safety Standard 212 ("FMVSS 212"), which standard concluded and determined for specific, articulated reasons that the subject truck should not be designed in the manner suggested by Gracia. Thus, Gracia's contention that there is no safety standard "in effect" regulating windshield retention in the subject truck is a misstatement of the applicable law and the underlying facts of this case. Contrary to Gracia's asser-

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[1] In 1994, the Safety Act was recodified as 49 U.S.C. § 30101 *et seq*. Although the language of the statute has been technically modified in the recodification and reenactment, it was done "without substantive change." See Pub. L. No. 103-272, § i(e), 108 Stat. 943. The above quoted provision was the language in effect at all times relevant for purposes of this litigation.

tions, the District Court and the Seventh Circuit each closely analyzed the regulatory history and intent behind FMVSS 212, and correctly determined that the *Myrick* decision supported a finding of preemption under the facts of this case. Thus, there is no reason for this Court to accept Gracia's petition since it would not provide an opportunity to establish new law, nor would it provide clarification of existing law.

The District Court and the Seventh Circuit's rulings that Gracia's claim was preempted by FMVSS 212 is in accord with the great weight of authority and reasoning upholding federal preemption under the Safety Act. U.S. Sup.Ct. Rule 10(c). Gracia's petition, albeit reluctantly, acknowledges the weight and validity of this Court's prior authority, and makes no effort to challenge or distinguish those decisions. This Court has consistently refused to accept for review, lower court decisions upholding federal preemption of common law claims in derogation of safety standards, and should similarly now refuse to accept Gracia's petition seeking review of two lower court decisions upholding federal preemption of her alleged common law claims in derogation of FMVSS 212.

Contrary to representations in Gracia's petition, there is no conflict among the state courts of last resort or federal courts regarding federal preemption based on FMVSS 212. U.S. Sup.Ct. Rule 10(a). This safety standard was debated extensively by the NHTSA, and substantial technical evidence and commentary was compiled over eight years resulting in the current version of Standard 212. With the exception of the instant case, Gracia's petition fails to direct this court to a single reported decision previously addressing federal preemp-

tion and FMVSS 212, thus no conflict can possibly exist. The handful of state courts of last resort to reject preemption outright (which no federal circuit court has ever done) have addressed federal preemption under FMVSS 208, but none have addressed preemption under FMVSS 212. See fn. 2, *infra*, p. 18-19. Until a conflict between state or circuit courts arises, there is no reason for this Court to accept Gracia's petition to resolve a conflict which does not exist.

Other than the conclusory statement, Gracia's petition fails to demonstrate that the Seventh Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." U.S. Sup.Ct. Rule 10(a). At best, Gracia has merely demonstrated her dissatisfaction with lower court decisions interpreting existing precedent, a far cry from meeting her burden of establishing compelling reasons for this Court to accept her petition. U.S. Sup.Ct. Rule 10.

In addition to arguing that Gracia's claims were preempted by federal law, Volvo has continued to argue that it would be entitled to judgment in its favor as a matter of law for one or more of the following reasons:

1. Volvo was entitled to summary judgment because Gracia's liability expert would not have been qualified to testify based on Fed. R. Evid. 403 and 702, as well as *Daubert v. Merrill Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993) and its progeny. *See also, Wiley v. Volkswagen of America, Inc.*, 805 F.2d 394 (M.D. 1986);
2. Volvo was entitled to summary judgment since the condition of the vehicle where Gracia chose to sit

was open and obvious. *Clark v. Penn Versatile Van,* 554 N.E.2d 643 (Ill. App. 1990);

3. Volvo was entitled to summary judgment because the condition of the truck was not the proximate cause of the accident or injuries. *Cannon v. Commonwealth Edison,* 621 N.E.2d 52 (Ill. App. 1993); *Suzik v. Sea-Land Corp.*, 89 F.3d 345 (7th Cir. 1996); and
4. The District Court erred in granting Gracia's motion to re-instate her claim 30 months after the case was dismissed. 735 Ill. Comp. Stat. 5/2-1009 (1993); 735 Ill. Comp. Stat. 5/13-217 (1993); *Otis v. City of Chicago,* 29 F.3d 1159 (7th Cir. 1994).

Neither the District Court nor the Seventh Circuit Court of Appeals decided these additional arguments, concluding they became moot upon a finding that Gracia's claim was preempted by the NHTSA and FMVSS 212. Because Volvo would still be entitled to judgment in its favor regardless of a ruling based on preemption, granting the petition would not alter the relationship of the parties, and thus mitigates against this Court's acceptance of Gracia's petition.

Finally, this Court should deny Gracia's petition since her statement of the case contains legal conclusions, contentions and argument, and is not limited to a recitation of facts material to the question presented in violation of U.S. Sup.Ct. Rule 14.1.(g), (h). This Court should also deny Gracia's petition since her statement of the case contains factual and legal misstatements and misrepresentations which bear directly on the question presented if the petition is granted in violation of U.S. Sup.Ct. R. 14.4. U.S. Sup.Ct. R. 15.2. Respondent, therefore, submits the following statement of the case.

STATEMENT OF THE CASE

Volvo was sued by Nancy Gracia for personal injuries based upon a common law theory of negligence relating to the design and manufacture of the windshield retention system of a forward control truck in excess of 10,000 pounds. In the District Court Gracia sought a voluntary dismissal or a thirty day extension of time due to difficulties relating to securing liability experts. In response to Gracia's request, the District Court entered a conditional involuntary dismissal order. More than thirty months after the dismissal order was entered, and over Volvo's objections as to jurisdiction, the case was reinstated without Gracia having met the conditions of the dismissal order.

At the time the final pre-trial order was filed, Volvo filed various dispositive motions, including motions for summary judgment based upon legal proximate cause, the existence of an open and obvious condition, and lack of reliable liability expert testimony. Gracia never objected to Volvo's Rule 12(m) statement of uncontested facts. Judge Paul Plunkett reviewed all motions, recommendations and objections, and thereafter granted Volvo's motion for summary judgment based upon federal preemption. Gracia thereafter appealed and the Seventh Circuit Court of Appeals affirmed summary judgment in favor of Volvo based on federal preemption. Neither the District Court nor the Seventh Circuit decided any of Volvo's other dispositive motions.

Gracia was injured in a two vehicle collision when she was riding as a third passenger in the cab of a 1986 Volvo FE6/13 forward control truck (the "subject truck") which was equipped with two seats for two persons, and

was being operated by her co-employee on a Chicago expressway. A "forward control" type vehicle can be described as having the windshield of the cab installed above the flat front end of the vehicle's cab with the vehicle controls in the cab located above and forward of the engine. Appendix B-1. Thus, the windshield is essentially positioned directly above the front bumper. In contrast, the windshield in a traditional or conventional truck cab is located well behind and away from the bumper, and behind the engine compartment.

While in traffic, the subject truck in which Gracia was riding struck the rear of a scrap steel hauling truck. As a result of the collision, the A-Pillar (the driver's side corner of the vehicle where the windshield and the driver's side door mounting meet) was crushed rearward, also dislodging the driver's side front wheel and partially collapsing the roof. During the accident sequence, the windshield was dislodged as designed and fell to the pavement Appendix B-2.

At the moment of impact, Ms. Gracia was seated in an elevated position on a pillow over the hot engine cover between the two seats (often referred to as the "bonnet" or "doghouse") in the cab of the subject truck. The two installed seats in the cab were each equipped with restraint systems and were occupied by the driver and another passenger. Because there was no seat on the engine cover, it was not equipped with any seatbelt or other restraining device. As a result of the impact, Gracia was thrown forward and through the windshield opening, injuring her spine when she struck the pavement in front of the subject truck. The driver and the other passenger, both of whom were also unbelted, were

not ejected from the cab and neither received any serious injury.

Gracia returned to part-time employment approximately six months after the accident and a short time later returned to full time employment which she continues today with a new employer. She can walk, exercise, drive a car and experience other life endeavors without aids, but continues to suffer some residual disability.

The subject truck was imported into the United States as one of five similar trucks purchased by Ryder Truck Rental ("Ryder") for lease to Gracia's employer, Brook Furniture Rental ("Brook"). Appendix B-1. Gracia acknowledged that she was aware that the Volvo truck had only two seats, neither of which were over the engine cover, and that no seat belt was available for persons sitting between the two seats. Gracia also acknowledged that prior to and on the date of the accident, she was aware of the danger of injury in a motor vehicle accident if she was not wearing a seat belt, and of the danger of being ejected from the vehicle in the event of an accident.

In preparation for trial, Volvo retained experts who opined that: (1) the speed of the subject truck at the time of impact could not be completely ascertained, but was in excess of 30 m.p.h.; (2) that Gracia would have sustained as severe or even greater injury, including death, had the windshield been retained in place; and (3) that the windshield is specifically designed to dislodge as a means of escape in accidents due to the high probability of fire, and as the only means of escape or emergency extrication in the event of a roll-over which is a common truck accident scenario.

In preparation for trial, Gracia retained a liability expert who opined that the subject truck failed to comply with FMVSS 212 which regulated windshield retention requirements in the subject truck at the time of its design and manufacture.

Specifically, FMVSS 212 "establishes windshield retention requirements for motor vehicles during crashes." *49 C.F.R. §571.212 S1.* This standard was in effect at the time of the accident and when the subject truck was manufactured. Appendix A; *49 C.F.R. §571.212 S3.*

REASONS FOR DENYING THE PETITION

I.

The Seventh Circuit Followed and Correctly Applied *Myrick.*

Prior to *Myrick*, the propriety of FMVSS 121 was raised in *Paccar, Inc. v. NHTSA*, 573 F.2d 632 (9th Cir. 1978). The *Paccar* court suspended enforcement of FMVSS 121, finding that the NHTSA had neglected to consider the high failure rate of ABS (anti-lock braking systems) devices in making its final ruling. *Id. at 642.* Until the NHTSA compiled sufficient evidence to demonstrate that ABS would not create even greater dangers than it sought to avoid, the *Paccar* court ruled that the regulation was unenforceable. *Id. at 642.*

Gracia's claim that the Seventh Circuit's decision directly conflicts with the Supreme Court's decision in *Freightliner Corp. v. Myrick*, 514 U.S. 1055 (1995), and indirectly with *Paccar* is without merit. As recognized by the Seventh Circuit, the critical distinction between the instant case and *Myrick,* while yet applying the holding

in *Myrick,* is that the federal regulation under consideration in *Myrick* (FMVSS 121) was suspended by the court in *Paccar* until the NHTSA was able to compile sufficient evidence demonstrating that the use of ABS on tractors and trailers would not increase the probability of danger. *Paccar, Inc. v. NHTSA,* 573 F.2d 632 (9th Cir. 1978). In contrast, no court or agency has struck down or sought to repeal FMVSS 212 which relates to windshield retention.

The NHTSA specifically addressed windshield retention, conducted hearings, and compiled evidence on forward control trucks as it developed and refined FMVSS 212. This evidence is most clearly seen in Standard 212's application section and in the detailed regulatory history for this standard. After detailed notice and comment, the NHTSA concluded and determined for specific, articulated reasons that forward control trucks should not be designed with a permanently affixed windshield, which is Gracia's sole claim here, because such design would be "impracticable" and would affect other safety considerations in all forward control trucks. 42 Fed.Reg. 34,289 (1977); 41 Fed. Reg. 36,493 (1976). Thus, the method of windshield retention proposed by Gracia under state law would directly conflict with the agency's findings and conclusions under federal law. The present case therefore presents the affirmative agency decision contemplated by *Myrick*, not a reversal by a reviewing court questioning the validity of the agency's evidence and rule making process as seen in *Paccar*. U.S. Const. Art. VI, cl.2. Gracia's decision to continuously ignore this critical distinction demonstrates that it is Gracia, and not the Seventh Circuit or the District Court, who is blatantly misreading and misapplying the Supreme Court's decision in *Myrick*.

This Court in *Myrick* specifically addressed Gracia's argument that the absence of regulation automatically precludes a preemption analysis. Although the *Paccar* court ultimately ruled in favor of the plaintiffs on other grounds, this Court in *Myrick* rejected such an argument as evidenced by the following:

> Indeed, the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes. NHTSA did not decide that the minimum objective safety standard required by 15 U.S.C. §1392(a) should be the absence of all standards, both federal and state. Rather, the lack of a federal standard stemmed from the decision of a federal court that the agency had not compiled sufficient evidence to justify its regulations.

Myrick, 514 U.S. at 286-87.

The language of FMVSS 212 and its unambiguous statement of the NHTSA's position with regard to the same aspect of performance which Gracia herein seeks to regulate by her common law action against Volvo clearly demonstrates affirmative agency decision making. The NHTSA concluded and agreed for specific, articulated reasons that complete windshield retention in forward control vehicles was impracticable, and that other safety concerns were paramount to the danger of passenger ejection.

It is uncontroverted that the subject vehicle was a forward control vehicle within the meaning of FMVSS 212. It is also uncontroverted that the subject vehicle weighed over 10,000 pounds. Nonetheless, despite the NHTSA's testing and express statement of its determination that the windshields of forward control vehicles

cannot feasibly be bonded and should not be permanently affixed for safety reasons, Gracia argues that the windshield should have been bonded or permanently affixed. Gracia's argument is directly at odds with the Safety Act and Standard 212, and if allowed to proceed, will impermissibly subject forward control truck manufacturers like Volvo to windshield installation and retention on a state by state basis.

The regulatory history of FMVSS 212 strongly reinforces the Seventh Circuit's decision finding federal preemption, and is consistent with this Court's decision in *Myrick*. The original draft of FMVSS 212 applied only to passenger cars. 34 Fed.Reg. 14,438 (1969). In 1969, the NHTSA proposed to "include requirements for windshield retention for multi-purpose passenger vehicles, trucks, and buses. . . ." *Id.* In response to this proposal, and in compliance with the NHTSA's procedures, the Automobile Manufacturers Association, Inc. ("AMA") and others submitted comments on or about February 25, 1970, one entitled "Windshield and Forward-Facing Window Requirements, Docket No. 69-29; Notice 2." The AMA, after its own testing, came to the following conclusion: "We believe that countervailing arguments militate against the coverage of large trucks." *Id. at S70-3.3.*

Such counterveiling arguments included findings by the Cornell Aeronautical Laboratories that: (1) impact deformation of the windshield mounting surface in a study of 680 truck accidents was so severe that *no* level of windshield retention would be meaningful (citing "Trucks in Rural Injury Accidents," Cornell Aeronautical Laboratories Report No. VJ-2721-R5, July 1969); (2) that most accidents involving trucks occur with only one occupant, the driver; and (3) that the windshield opening

in heavier trucks could be utilized to escape from the vehicle following an accident such as in a situation where a truck comes to rest upon its side, a common occurrence in truck accidents. *Id. at S70-3.4.*

The AMA further commented that with regard to forward control type configurations, a "windshield retention standard would be of little or no value in serving to contain the occupant within the vehicle." *Id.* Forward control vehicles, "because of their unique characteristics, in many accidents involving these vehicles, almost instantaneously the windshield is contacted by the object struck or the impact results in substantial deformation of the mounting structure. In either event, specifying a windshield retention capability would be meaningless." *Id. at S70-3.5.*

Following consideration of substantial data and commentary, the NHTSA agreed to revise its 1969 version of Standard 212, concluding:

> It is recognized that forward control vehicles may have difficulty achieving windshield retention since objects impacted by the front of such a vehicle tend to either impact the windshield itself, or deform the windshield mounting. Recognizing this problem, the standard would not be applicable to forward control vehicles until September 1, 1978. *37 Fed.Reg. 16,979 (1972).*

In 1974, after five more years of deliberation and further review of authoritative material relating to windshield retention in forward control vehicles, and of vehicles over 10,000 pounds, the NHTSA made an affirmative decision that forward control vehicles should not be designed or manufactured so that the windshield is retained in the event of an accident. The NHTSA cited as

additional support for its decision that these types of vehicles have stiff frames which subject the truck's windshield to extreme torsional stress in the event of a collision. Again, the NHTSA acknowledged that the windshield of a forward control vehicle would likely be instantly contacted in a collision and unable to restrain passengers. *39 Fed.Reg. 2274 (1974).*

In 1976, after allowing further comment and consideration of materials relevant to windshield retention, the NHTSA again stated the rationale behind its decision not to impose a windshield retention standard which bonded or permanently affixed the windshield stating: "[F]orward control vehicles and open-body vehicles with fold-down windshields are excluded from the application of the standard because of the impracticability of conforming with the requirement." *41 Fed.Reg. 36,493 (1976).*

Finally, in 1977, after the proposed amendment to FMVSS 212 had been adopted in a modified form, the NHTSA again commented: "Open-body type" vehicles and "forward control" vehicles were excluded because of the impracticability of applying the barrier crash test to these vehicles. *42 Fed.Reg. 34,288, 34,289 (1977).*

The extensive agency fact-finding and review process that the NHTSA engaged in prior to promulgation of the current version of FMVSS 212 is exactly what this Court expected of the same agency before it drafted and then sought to enforce FMVSS 121 involving ABS. *Paccar*; *Myrick*. Gracia makes no effort to challenge the constitutionality or enforceability of FMVSS 212, and Volvo is unaware of any such challenges to Standard 212 since 1977. In accordance with FMVSS 212, due to crash-

worthiness and safety concerns for operators of forward control vehicles, the NHTSA has determined that windshields of forward control vehicles cannot and should not be permanently affixed as Gracia presents in her petition and relies upon for her claim.

Throughout this litigation, Gracia has chosen to ignore the NHTSA's specific, articulated findings in her attempt to impose a state, or for that matter, multiple state common law standards in direct conflict with FMVSS 212. Gracia's repeated attempts to characterize the history and findings of the NHTSA which culminated in the current version of FMVSS 212 as "non-regulation" or an absence of regulation ignores the language of the standard, as well as the reasons for the agency's decision all together. As the Seventh Circuit stated after carefully reviewing FMVSS 212 and its regulatory history:

> The district court correctly determined that Gracia's common law claim was preempted and stated that "there has been 'an affirmative decision by agency officials' that there should be no standard because the nature of the cab design on forward control vehicles makes compliance with the minimum standard set by FMVSS impracticable." (citation omitted) Allowing a state common law standard on windshield retention would, accordingly, be a standard that is not identical to the federal one. Therefore, we conclude that the NHTSA's explicit exclusion of forward control vehicles from having to meet any windshield retention requirements in Federal Safety Standard 212, along with the inapplicability of the standard to vehicles over 10,000 lbs., expressly preempts Gracia's state common law action.

Gracia v. Volvo Europa Truck, N.V., 112 F.2d 291, 297 (7th Cir. 1997).

Because the sound reasoning of this Court as set forth in *Myrick* clearly supports the Seventh Circuit's finding of federal preemption, and because this Court's decision in *Myrick* requires no further clarification, Gracia's petition should be denied.

II.

There Is No Conflict In The Lower Courts Over The Question Of Whether FMVSS 212 Preempts Windshield Retention Claims In Forward Control Trucks Over 10,000 Pounds.

Gracia fails in her attempt to establish that the Seventh Circuit's opinion is in conflict with other circuit courts or state courts of last resort. In fact, quite the opposite is true. In addition to the fact that the Seventh Circuit opinion in this case is the only reported decision ever addressing preemption under FMVSS 212, the "overwhelming majority" of the cases addressing preemption under the Safety Act have found preemption. *Cooper v. General Motors*, 1997 WL 751947 (Miss. 1997). In *Cooper*, as with most other airbag cases, the plaintiff alleged that an automobile was defective under state tort law because it was not equipped with an airbag. *Id.* The Mississippi Supreme Court held that FMVSS 208 preempted the plaintiff's claim under the Safety Act because FMVSS 208 had given the auto manufacturer the option of installing an airbag or a lap and shoulder belt with a warning system. Thus, the plaintiff's attempt to pursue a common law claim seeking to impose a duty on the manufacturer to install an airbag directly conflicted with FMVSS 208.

Like the claims involving FMVSS 208, this case presents a classic example of an attempt to impose a con-

flicting state standard. Here, Gracia's proposed common law standard would directly conflict with FMVSS 212 and its regulatory history, as well as the NHTSA's conclusions regarding windshield retention on forward control vehicles. Gracia's argument, if accepted, would create precedent for eliminating federal preemption in every instance, a result clearly not warranted under the unique and singular facts of this case.

Despite a wealth of authority adverse to Gracia's position, Gracia attempts to convince this Court that the Seventh Circuit has taken a minority position on federal preemption. In reality, there are more than 50 federal cases and more than 80 state cases finding preemption under the Safety Act. A few of the more significant cases finding preemption under the Safety Act are as follows: *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997); *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 61 (1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3rd Cir. 1990), *cert. denied*, 498 U.S. 853 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). *Cooper v. General Motors Corp.*, 1997 WL 751947 (Miss. 1997); *Zimmerman v. Volkswagen of America, Inc.*, 920 P.2d 67 (Idaho 1996), *cert. denied*, 117 S. Ct. U.S. 1245 (1997).[2]

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[2] None of the circuit court cases cited by Petitioner support her argument that there can be no preemption of common law claims under the Safety Act. Gracia Petition, pp. 15-16. *Doyle v. Volkswagenwerk AG*, 114 F.3d 1134, 1135 (11th Cir. 1997) (discussing answer to certified question on state law to Supreme Court of Georgia and remanding to district court); (continued...)

Some of the above decisions upheld express preemption [*see Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997)]; some upheld implied preemption [*see Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988)]; and some upheld *both* express and implied preemption. *Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis.Ct.App. 1993). As one court has stated, "almost every court finds preemption in one way or another." *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. A.D. 1994).

Gracia posits that all courts to have reached "this precise issue" have ruled against preemption citing *Attocknie v. Carpenter Manufacturing, Inc.*, 901 P.2d 221 (Okla. App. 1995) and *In Re: Ford Motor Company Bronco II Products Liability Litigation ("Bronco II")*, 909 F. Supp. 400 (E.D. LA. 1995). Petition, p. 9. A closer reading of these cases demonstrates that neither addresses preemption under FMVSS 212, and neither supports the arguments raised in Gracia's petition.

The reasoning of the court in *Bronco II* actually supports the Seventh Circuit decision below. In *Bronco II*, the purchasers of 1983-1990 model year Ford Bronco II

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[2] (...continued)
Perry v. Mercedes Benz, 957 F.2d 1257 (5th Cir. 1992) (findings that the savings clause did *not* destroy preemption under the Safety Act); *Larson v. General Motors*, 391 F.2d 495 (8th Cir. 1968) (decision did not address preemption). The Eleventh Circuit's sole mention of the viability of preemption under the Safety Act in *Doyle*, which had not been ruled on by the district court, was a citation to its opinion in *Myrick*, which this court affirmed on other preemption grounds. *Myrick v. Freuhof Corp.*, 13 F.3d 1516 (11th Cir. 1994), affirmed in *Freightliner v. Myrick*, 514 U.S. 280, 115 S. Ct. 1483 (1995). Thus, the Eleventh Circuit's discussion of preemption in *Myrick* is mere dicta.

vehicles brought product liability actions against Ford alleging that the vehicles were unduly prone to rollover. Ford argued that the plaintiff's state law claims were preempted because of the NHTSA's failure to impose a uniform anti-rollover stability standard. Specifically, Ford contended that because the NHTSA decided that a consumer information regulation was the most cost-effective manner of handling the situation, rather than promulgating or expressing a conclusion about a stability standard, that state law claims were preempted. The court in *Bronco II* undertook an extensive examination of the relevant administrative history concerning the stability standard, and concluded that the plaintiff's claims were not preempted because the NHTSA had failed to compile sufficient evidence to render an informed decision on the issue. The *Bronco II* court stated: "Instead, the lack of a federal standard has resulted from the agency's decision that *it has not compiled sufficient evidence* at this time, from a cost-benefit perspective, to justify a singly uniform stability standard." *Bronco II*, 909 F. Supp. at 408. (Emphasis added.)

Unlike *Bronco II*, the present case demonstrates that the NHTSA compiled evidence over an 8 year period before it drafted the version of FMVSS 212 at issue. Thus, unlike *Paccar* where a safety standard was struck down, and *Bronco II* where the NHTSA never considered the implementation of a roll-over standard, the instant case demonstrates affirmative agency decision-making as it relates to windshield retention in forward control vehicles.

The decision in *Attocknie* also does not address FMVSS 212, nor does it conflict with the Seventh Circuit's

opinion herein. *Attocknie* was decided before this Court's decision in *Myrick,* and was based on the Oklahoma Appellate Court's interpretation of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), an interpretation this Court later rejected in *Myrick*. Further, *Attocknie* did not present sufficient facts demonstrating affirmative agency decision-making.

Allowing Gracia to enforce her proposed state law windshield retention standard would place Volvo in an indefensible, impracticable and conflicting position of affixing truck windshields for use across state lines. There could be different standards imposed by each state or no standard at all, thus exposing Volvo to substantial risk of liability without knowing in advance the nature or extent of a state windshield retention standard until after one of its trucks was involved in an accident and it was sued in tort for a defect relating to windshield retention. Clearly, the Safety Act was never intended to impose such a burden on a motor vehicle manufacturer such as Volvo, nor should Gracia be allowed to impose such a burden by further prosecution of her claim against Volvo.

Accordingly, the District Court's and the Seventh Circuit's finding of express preemption of Gracia's claim against Volvo was correct and completely consistent with the reasoning of this Court as contained in *Myrick* and other decisions. The Seventh Circuit decision was based on a fair and reasonable reading of the Safety Act, and gave consideration to the NHTSA's conclusions and findings with regard to FMVSS 212. The Seventh Circuit would also have been correct had it found implied preemption under the facts of this case.

III.

The Petition Presents No Reason For This Court To Depart From Its Prior Decisions Holding That Common Law Claims Are Subject To Federal Preemption.

Gracia also contends that common law claims are "**NEVER**" preempted by the Safety Act. Petition, p. 17. Although Gracia's petition relies heavily on isolated and ambiguous comments by individual legislators and essentially ignores the express preemption clause of the Safety Act, the provisions of the Act and this Court's prior interpretation of such language is paramount.

The preemption provision of the Safety Act provides that when a federal motor vehicle safety standard is in effect, no state may establish or continue in effect "any safety standard" applicable to the same aspect of performance of motor vehicles or items of motor vehicle equipment unless the state standard is "identical" to the federal standard. 15 U.S.C. § 1392(d). Specifically, the express preemption provision states as follows:

> Whenever a Federal Motor Vehicle Safety Standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. §1392(d). Appendix A-4.

Established precedent of this Court holds that this language encompasses state common law to the same extent it encompasses state statutory and regulatory

law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). The critical term, "standard," is, of course, the normal term referring to the common law duties imposed by tort law.[3] In *Cipollone*, this Court made it clear that similar language "easily" encompassed tort actions because "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *Cipollone*, 505 U.S. at 521 (plurality opinion); *see also Cippollone,* 505 U.S. at 548-49 (Scalia, J., concurring in judgment in part and dissenting in part). In *CSX Transportation v. Easterwood*, this Court construed the phrase "law, rule, regulation, order, or standard," and readily concluded that common law duties "fall within the scope of these broad phrases." *CSX*, 507 U.S. 658, 663-64. Where common law standards address product safety, then they are "safety standards" in ordinary, accepted usage. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987) (referring to state safety standards set by California product liability common law). *See also International Paper Company v. Ouellette*, 479 U.S. 481, 496 (1987) (noting the "possibility that [the defendant] will have to meet a number of different standards" if sued under different states common law); *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2269 (Breyer, J. concurring in part and concurring in the judgment); *id.* at 2262 (O'Connor, J., with whom the Chief Justice, Justice Scalia and Justice Thomas joined, concurring in part and dissenting in part). Accordingly, the

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[3] *See e.g.*, W. PAGE KEETON, *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 3075, 99 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 282, (1965); *Ingersol Rand Company v. McClendon*, 498 U.S. 137, 142 (1990); *Italia Societea Per Azioni Di Navigazione v. Oregon Stevedoring Company*, 376 U.S. 315, 322-23 (1964).

Seventh Circuit correctly followed the established precedent of this Court when it concluded that the Safety Act preempted Petitioner's common law product liability design defect claim in this case. *Gracia*, 112 F.3d at 297.

Gracia's reliance on the savings clause set forth in 15 U.S.C. § 1397(k) is equally futile. The savings clause does not override the doctrine of federal preemption, nor does it preserve conflicting state safety standards. 15 U.S.C. § 1392(d). Appendix A-4. This Court would be inconsistent with its own precedent if it were to allow Gracia to pursue her claim in the face of affirmative agency action to regulate windshield retention in forward control trucks by allowing a common law claim to override the preemption clause of the Safety Act. Clearly the facts of this case do not warrant such drastic measures.

Gracia's novel interpretation of the Safety Act savings clause is also undercut by a number of prior decisions rejecting such an interpretation involving similar savings clauses. *Texas & Pacific Railroad v. Abilene Cotton Company*, 204 U.S. 426 (1907) (sweepings "savings" clause did not preserve state actions). In *Morales v. Transworld Airlines*, 504 U.S. 374 (1992), this Court directly ruled that general savings clause language did not authorize a state action so as to supersede an express preemption clause. *Accord, International Paper Company v. Ouellette*, 479 U.S. 481, 494 (1987). As noted by the Court in *Pennsylvania Railroad v. Puritan Coal Mining Company*, 237 U.S. 121 (1950), a savings clause "was added at the end of the statute, not to nullify other parts of the Act, or to defeat rights or remedies given by the preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute." There is no basis for a different conclusion in the instant case.

This Court's decision in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), also supports the Seventh Circuit's holding that Gracia's claims were expressly preempted in this case in spite of the Safety Act savings clause. In *CSX*, this Court held that expressed preemptive language is necessarily the best evidence of Congress' preemptive intent. 507 U.S. at 663-664. The Federal Railroad Safety Act ("FRSA"), like the Safety Act in this case, has both a preemption clause and a savings clause. *Id.* In *CSX*, this Court held that the FRSA expressly preempted any state requirement sought to be imposed on the defendant, including a requirement sought to be imposed by a common law negligence action. *Id.*

As the First Circuit also recognized in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990), the language of the savings clause definitively is not the language commonly employed by Congress in savings clauses intended to restrict the scope of preemption. Rather, the "compliance with" language of the savings clause addresses a different issue—namely, the extent to which compliance with government statutes or regulations is a statutory or common law affirmative defense—a point that has not been raised as an issue in this case.

The above authority directly refutes Gracia's argument that the Safety Act savings clause magically preserves all claims, even where the claim runs afoul of express preemption or implied preemption. To conclude otherwise would allow states to establish individual windshield retention standards when a federal agency has determined that it would be impracticable, infeasible and dangerous for specific and articulated reasons to require retention

of windshields of forward control vehicles, including the subject vehicle.[4]

Gracia's reliance on the legislative history of the Safety Act also fails to support her position and fails to provide any basis for accepting her petition. There is one reference to "common law" in the Congressional reports' discussion of the preemption provision. The Senate Report, after stressing the need for uniformity, notes that states may set standards for their own procurements, but not conflicting standards and then explains: "Moreover, the federal minimum safety standards need not be interpreted as restricting state common law *standards of care*. Compliance with such standards of care would thus not necessarily shield any person from product liability at common law." S. Rep. No. 89-1301 at 12 (1966) (emphasis added). The use of the term "standard" in referring both to the federal standards and to common law duties confirms the natural meaning of "standard" in the Safety Act as including common law tort claims; so too does the very fact that the committee undertook to offer an explanation on the point. Nor does H.R. Rep. No. 89-1776 (1966), or the other legislative history of the Safety Act which Gracia relies on address the issue of federal preemption. In fact, none of the comments of any of the witnesses, senators, or congressmen debating the bill address the substantial issue of express preemption as

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[4] The foregoing analysis of the savings clause is similarly applicable to implied preemption where a state law common law claim conflicts with federal law so as to frustrate the purpose of the federal law or to make it impossible to comply with both federal and state law. *Myrick*, 514 U.S. at 287 (conducting an implied preemption analysis under a NHTSA preemption argument).

provided by the Act; their comments merely paraphrase the savings clause language of the Act. *Gracia*, 112 F.3d at 298.

Gracia incorrectly reads the specific, express preemption provision out of the Safety Act in favor of the general "savings" provision which makes no reference to preemption. As stated earlier in part II, the overwhelming weight of authority rejects Gracia's argument that there is no preemption under the Safety Act. Further, the limited cases refusing to find preemption under the Safety Act have not addressed FMVSS 212 or the unique and specific facts of this case.

CONCLUSION

The subject case does not present a novel issue of law, it presents no conflict between federal or state courts requiring resolution by this Court, and would not result in any clarification of existing law so as to provide a basis for this Court's exercise of discretionary jurisdiction. The lower court decisions are well developed and conform with existing precedent. For each of these reasons and for the other reasons as discussed herein, this Court should deny Nancy Gracia's petition for a writ of certiorari.

Respectfully submitted,

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ROOKS, PITTS AND POUST
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APPENDICES

APPENDIX A

§ 571.212 Standard No. 212; Windshield Mounting.

S1. *Scope*. This standard establishes windshield retention requirements for motor vehicles during crashes.

S2. *Purpose*. The purpose of this standard is to reduce crash injuries and fatalities by providing for retention of the vehicle windshield during a crash, thereby utilizing fully the penetration-resistance and injury-avoidance properties of the windshield glazing material and preventing the ejection of occupants from the vehicle.

S3. *Application*. This standard applies to passenger cars, and to multi-purpose passenger vehicles, trucks, and buses having a gross vehicle weight rating of 10,000 pounds or less. However, it does not apply to forward control vehicles, walk-in van-type vehicles, or to open-body type vehicles with fold-down or removable windshields.

S4. *Definition*. "Passive restraint system" means a system meeting the occupant crash protection requirements of S5. of Standard No. 208 by means that require no action by vehicle occupants.

S5. *Requirements*. When the vehicle traveling longitudinally forward at any speed up to and including 30 mph impacts a fixed collision barrier that is perpendicular to the line of travel of the vehicle, under the conditions of S6, the windshield mounting of the vehicle shall retain not less than the minimum portion of the windshield periphery specified in S5.1 and S5.2.

S5.1 *Vehicles equipped with passive restraints*. Vehicles equipped with passive restraint systems shall retain

not less than 50 percent of the portion of the windshield periphery on each side of the vehicle longitudinal centerline.

S5.2 *Vehicles not equipped with passive restraints.* Vehicles not equipped with passive restraint systems shall retain not less than 75 percent of the windshield periphery.

S6. *Test conditions.* The requirements of S5. shall be met under the following conditions:

S6.1 The vehicle, including test devices and instrumentation, is loaded as follows:

(a) Except as specified in S6.2, a passenger car is loaded to its unloaded vehicle weight plus its cargo and luggage capacity weight, secured in the luggage area, plus a 50th-percentile test dummy as specified in Part 572 of this chapter at each front outboard designated seating position and at any other position whose protection system is required to be tested by a dummy under the provisions of Standard No. 208. Each dummy is restrained only by means that are installed for protection at its seating position.

(b) Except as specified in S6.2, a multipurpose passenger vehicle, truck, or bus is loaded to its unloaded vehicle weight, plus 300 pounds or its rated cargo and luggage capacity, whichever is less, secured to the vehicle, plus a 50th-percentile test dummy as specified in Part 572 of this chapter at each front outboard designated seating position and at any other position whose protection system is required to be tested

by a dummy under the provisions of Standard No. 208. Each dummy is restrained only by means that are installed for protection at its seating position. The load is distributed so that the weight on each axle as measured at the tire-ground interface is in proportion to its GAWR. If the weight on any axle when the vehicle is loaded to its unloaded vehicle weight plus dummy weight exceeds the axle's proportional share of the test weight, the remaining weight is placed so that the weight on the axle remains the same. For the purposes of this section, unloaded vehicle weight does not include the weight of work-performing accessories. Vehicles are tested to a maximum unloaded vehicle weight of 5,500 pounds.

S6.2 The fuel tank is filled to any level from 90 to 95 percent of capacity.

S6.3 The parking brake is disengaged and the transmission is in neutral.

S6.4 Tires are inflated to the vehicle manufacturer's specifications.

S6.5 The windshield mounting material and all vehicle components in direct contact with the mounting material are at any temperature between 15° F and 110° F.

STATUTES

15 U.S.C. § 1392(d), recodified without substantive change as 49 U.S.C. § 30103(b), provides:

> (d) Supremacy of federal standards; allowable higher standards for vehicles used by Federal or state governments.
>
> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1397(k), recodified without substantive change as 49 U.S.C. § 30103(e), provides:

> Compliance with any Federal motor safety standard issued under this subchapter does not exempt any person from any liability under common law.

APPENDIX B

1-Photograph of FE 6/13 - undamaged.

2-Photograph of Subject Truck - post accident.


BROOK
HOME &
OFFICE
BROOK
FURNITURE RENTAL
BROOK
FURNITURE RENTAL
BROOK
VOLVO
FEB

B-1


FURNITURE RENTA
93-0170

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 10, 1997.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

NANCY GRACIA,

Plaintiff-Appellant,

No. 96-2774 v.

VOLVO EUROPA TRUCK, N.V.,
a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 10005—Paul E. Plunkett, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellant Nancy Gracia, no judge in active service has requested a vote thereon, and

all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.